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In United States v. Bram, 18 S. C. Rep. 183, the Supreme Court of the United States divided upon an important question of criminal law involving the constitutional privilege of the accused in a criminal trial from being compelled to be a witness against himself. The evidence offered, and the admission of which by the lower court was held by the supreme court to be ground for reversal, was in the nature of a confession alleged to have been extorted from the prisoner. The defendant was accused of the murder of the captain of his vessel upon the high seas. It appeared that a police officer, Power by name, had the defendant brought into his private office and then examined him alone, having first stripped him of his clothing, but making no threats nor offering any inducements to him. Power said to him, "Bram, we are trying to unravel this horrible mystery. Your position is rather an awkward one. I have had Brown in this office and he made a statement that he saw you do the murder." Bram said, "He could not have seen me. Where was he?" "He states he was at the wheel." "Well, he could not see me from there." "Now, look here Bram. I am satisfied that you killed the captain, from all I have heard from Mr. Brown. But some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders." "Well, I think, and many others on board the ship think, that Brown is the murderer; but I don't know anything about it." This conversation was offered as an admission and the ground of the decision was that it was not voluntary, and hence not admissible. It is difficult to understand how the conversation may reasonably be considered as an admission of guilt. In fact it appears to be a denial, and for that reason the State contended in the supreme court that as the admission did not tend to prove guilt, its admission could not have been prejudicial to the defendant. But the court very properly held as to this, that in determining whether the proper foundation was laid for the admission of evidence offered as a confession, the reviewing court is not concerned as to how far the evidence tends to prove guilt. If illegally admitted, reversible error results, since the prosecution, after securing the admission of evidence as a confession, will not be heard to assert that it does not tend to prove guilt. Upon the main question as to the manner in which the alleged confession was obtained, it may be said that what amount of proof is necessary to show an involuntary state of mind, must depend in each case on its peculiar circumstances. "The rule is not," says Mr. Justice White, who wrote the opinion for the court, "that in order to render a statement admissible, the proof must be adequate to establish that the particular communications contained in a statement were voluntarily made, but it must be sufficient to establish that the making of the statement was voluntary; that is to say, that, from causes which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged, the accused was not involuntarily impelled to make a statement when but for the improper influences he would have remained silent." All the leading English and American cases on what words are sufficient to constitute an inducement, and thus render the confession involuntary are reviewed, the conclusion of the court being that "the situation of the accused, and the nature of the communication made to him by the detective, necessarily overthrow any possible implication that his reply to the detective could have been the result of a purely voluntary mental action; that the result was to produce upon his mind the fear that, if he remained silent, it would be considered an admission of guilt, and therefore render certain his being committed for trial as the guilty person; and it cannot be conceived that the converse impression would not also have naturally arisen that, by denying, there was hope of removing the suspicion from himself. * * * To communicate to a person suspected of the commission of crime the fact that his co suspect has stated that he has seen him commit the offense, to make this statement to him under circumstances which call imperatively for an admission or denial, and to accompany the communication with conduct which necessarily

perturbs the mind and engenders confusion of thought, and then to use the denial made by the person so situated as a confession, because of the form in which the denial is made, is not only to compel the reply, but to produce the confusion of words supposed to be found in it, and then use statements thus brought into being for the conviction of the accused." Mr. Justice Brewer dissented in an opinion concurred in by Chief Justice Fuller and Mr. Justice Brown, in which it is apparent that the division of the court was mainly upon the determination of the fact whether the alleged confession was or was not involuntary.

NOTES OF IMPORTANT DECISIONS.

DAMAGES — BREACH OF CONTRACT—COUNSEL FEES — MUNICIPAL CORPORATION — ASSESSMENT. — Is a city liable for attorney's fees incurred in prosecuting the action against the owners whose lands were claimed to have been benefited by the respective improvements, but which were found not liable to assessment. This was the question involved in Gates v. City of Toledo, 48 N. E. Rep. 500, decided by the Supreme Court of Ohio, in the negative. "Probably there is no difference," says Spear J., for the court, "in principle between counsel fees and other expenses. The affirmative of this proposition is based upon the further proposition that, in a suit for breach of an agreement in a written contract by which a claim or chose in action is assigned, the party damaged may recover the costs and expenses of previous unsuccessful litigation, necessarily resulting from such breach, including counsel fees; and especially so where there has been a guaranty of title, and the title fails, or of validity, and the claim assigned proves invalid. Decisions of courts in other States support this claim. But they are not uniform, and the question, after all, is, what is the law of this State on the subject? Decisions of this court determine the matter as to cases bearing more or less analogy to the cases at bar, but the precise question has not heretofore been presented. The rule that in actions involving malice, fraud, insult, or oppression, reasonable counsel fees may be included in the recovery, is well established. Stevens v. Handly, Wright, 121; Sexton v. Todd, *Id.* 316; Roberts v. Mason, 10 Ohio St. 277; Finney v. Smith, 31 Ohio St. 529; Stevenson v. Morris, 37 Ohio St. 10; and Iron Co. v. Harper, 41 Ohio St. 100,—are cases of this character. So where land is conveyed with covenants of warranty and for quiet enjoyment, and a breach follows, and the covenantee is evicted by reason of a paramount title, and in such suit has vouched in the covenantor to defend the title, his damages for the breach may include an allowance for counsel fees. McAlpin v. Woodruff, 11 Ohio St. 120, and Lane v. Fury, 31 Ohio St. 574, are cases illustrative of this rule. Other cases are to the effect that in actions on attachment or injunction or replevin bonds, where, in previous suit, the attachment has been discharged or the injunction dissolved, or recovery had against the officer for wrongful seizure, counsel fees in such actions may be allowed in suits upon the bonds. Noble v. Arnold, 23 Ohio St. 264; Alexander v. Jacoby, *Id.* 358, and Finckh v. Evers, 25 Ohio St. 82, are cases of this character. The foregoing cases show the extent to which counsel fees have been allowed as part of the recovery of damages by decisions of this court. One case in the superior court of Cincinnati (Kirchner v. City of Cincinnati, 14 Cin. Law Bul. 48) holds that damages for failure to give to the contractor a legal assessment for the construction of a sewer may include costs and counsel fees in an unsuccessful suit by the contractor to recover against the landowner. This holding was predicated on the cases heretofore cited in 11 Ohio St. 120, and 31 Ohio St. 574, involving damages for breach of covenants in deeds. No other reported case in this State, so far as our search has extended, goes to this length. One case distinctly holding against such recovery is that of City of Cincinnati v. Steadman, a circuit court case reported in 8 Ohio Cir. Ct. R., at page 407, by Smith, J. The case was brought to this court, but upon questions other than the one above stated, and the inquiry here did not involve the question of counsel fees.

It will be noted that in the cases upon tort where counsel fees have been considered although treated as part of plaintiff's compensation, they relate to such probable expense of this character as would be incurred in the case on trial, and which would be present in the minds of the jury, but that no proof was allowed as to their extent or value. This principally or partly because, if proof were given, it would introduce a new issue, and would result in an unseemly controversy. Among the varying grounds stated by different judges for allowing counsel fees in such cases as part of the plaintiff's compensation, perhaps the most reasonable one is that inasmuch as the law furnishes no exact measure, and since such matter of damage can, in practice, hardly be excluded from the jury, they should be allowed to be taken into consideration under proper instructions. But, as they are matters of actual expense, they cannot reasonably be allowed under the head of exemplary damages, and so, necessarily, should be included as part of compensation. In the cases upon undertakings or bonds, where counsel fees actually incurred in preceding litigation were allowed, the decisions are based on the provisions of the bonds themselves, as where the obligation is "to pay all damages he may sustain," etc., or "to save harmless and pay all damages he may sustain," etc., or the like. The recovery of counsel fees and other expenses incurred in defending

title to land which had been warranted is based on diverse grounds,—one being that such expenses should be considered as a portion of the money paid for the title (that is, a portion of the purchase money); another, and one which seems more reasonable and satisfactory, is that the solemnity which should surround the transfer of real estate, and the necessity of maintaining stability of titles, require the rule. It may be that the *rationale* of the decisions affecting titles to real estate, applied to contracts affecting the title to personalty and choses in action, might warrant a similar rule. But it is believed that the policy of this State has been, and the understanding generally among bench and bar is, that such damages are not recoverable for the breach of simple contracts, not involving tort, even though there has been an express agreement as to the validity of the thing in controversy."

INJUNCTION — RESTRAINING VOID JUDGMENT —EQUITY — REMEDY AT LAW.—In Bankers' Life Insurance Company v. Robbins, 73 N. W. Rep. 269, the Supreme Court of Nebraska was called upon to decide under what circumstances a court of equity will enjoin the collection, by execution, of a judgment at law, void for want of jurisdiction over the person of the defendant. The opinion, which is in the well-known, lucid, and forcible style of Commissioner Ragan, reiterates the doctrine now held by a majority of the courts that it is not sufficient for the defendant, seeking to invoke the extraordinary powers of a court of equity for his protection, to show merely that the judgment is void for want of service of process, but that he must go further and both allege and prove that he has a defense to the plaintiff's claim upon its merits. Otherwise he will be remitted to his remedies at law; and he must make it appear, in addition thereto, that these remedies are not as adequate and effectual as that by injunction. When, however, these conditions have been met, the right and duty of the court to exercise its chancery powers for the restraint of the execution and the vacation of the void judgment, are as undoubted as any within its undisputed jurisdiction, and the opinion reminds the profession that the rule requiring pleading and proof of a defense to the plaintiff's claim, is not one which extends so far as to compel the defendant to forego his right to a trial by jury of the vicinage, and submit the issues properly triable at law to the final determination of a single judge. It suffices in this respect to plead a valid defense and make it out *prima facie* by proofs. When this has been done, and the inadequacy of legal remedies is apparent, and the plaintiff in equity is shown to be free from culpable neglect in not making his defense at law, the court refrains from passing finally upon the questions of fact, but sets aside the void judgment and remits the plaintiff, as well as the defendant, therein, to the ordinary action at law, where such matters are properly cognizable. In the case under consideration the insurance company, a domestic corporation, was suable under existing circumstances only in Lancaster county where its principal place of business was situate. The alleged judgment was obtained in Valley county where the company had no agency and the pretended service of process from the Valley county district court was, for reasons set out in the opinion, found to be void, but it was proved that the company had knowledge of the pendency of the proceedings in time to have enabled it to enter a special appearance and object to the jurisdiction of the Valley county court. With respect to the contention that the company was guilty of neglect in omitting to make such appearance and objection, and with respect to the adequacy of legal remedies one cannot do better than to quote from the opinion itself: "A second question under the rule is, had the appellant a remedy at law? The insurance company knew that Mrs. Morrow had sued it in Valley county, and obtained this information before the time fixed for it to answer by the summons issued in that case. It might have appeared specially in that court, and objected to its jurisdiction on the ground that the summons had not been served on it in that county, nor upon any one whow as its agent. After the judgment was rendered, it might have prosecuted an error proceeding therefrom to this court; and we think it might have moved the court, under section 602 of the Code of Civil Procedure, to set the judgment aside. If the execution issued on the judgment had been levied upon its real estate, it might have resisted a suit in ejectment brought by the purchaser at the execution sale. Here, then, is not only a remedy, but several remedies, at law. But were these remedies adequate ones, within the meaning of the rule and the law?" In Welton v. Dickson, 38 Neb. 782, 57 N. W. Rep. 559, this court, following the rule laid down by the Supreme Court of the United States in Watson v. Sutherland, 5 Wall. 74, said: "It is not enough that there is a remedy at law. It must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. If the insurance company, on being informed that it had been sued in Valley county, had appeared specially in that court, objected to its jurisdiction over it, and put the proof that it has in this case, then, had the district court ruled in favor of its jurisdiction, the insurance company might have prosecuted an error proceeding to this court which would have resulted in a dismissal of the action brought in Valley county. But if the insurance company was not situated in, and had no agent in, Valley county, within the meaning of section 55 or 74 of the Code of Civil Procedure, it was entitled to have the suit against it tried in the district court of Lancaster county; and while, by appearing specially in Valley county, and objecting to the jurisdiction of the court, and prosecuting a proceeding in error, if unsuccessful, to this court, it would have obtained the same result that it seeks to obtain by this injunction proceeding, still we

do not think the insurance company's remedies by special appearance or motion under section 602 of the Code were adequate ones. A remedy is not adequate, within the meaning of this rule, which compels the citizen to go from the county of his residence into a foreign jurisdiction, in which he has never been present, and in which he has never been lawfully summoned. The right of the insurance company to be sued in the county where its principal place of business was located, or in some county in which it was situated or had an agent, was and is a legal right; and it is a strained construction of language to say that, because a litigant may go into a foreign jurisdiction, and enter a special appearance to an action, that remedy is adequate, when, besides the costs, expenses, and time spent in attending court in the foreign jurisdiction, he is compelled to surrender valuable legal rights. The insurance company might have taken this judgment to the supreme court on error proceedings at any time within one year after its rendition, but that remedy would not have been adequate, because the record discloses on its face that the insurance company had been duly summoned in Valley county, and in that proceeding it could not have introduced evidence to show that it had in fact no agent or agency in that county upon whom service of process could be made. Had the insurance company waited until the sheriff levied upon its personal property, and replevined it, or had it waited and resisted an ejectment suit by the purchaser of its real estate at execution sale, then the record discloses that it would have had no redress for the costs expended by it in prosecuting the replevin action or in resisting the ejectment suit as the appellees were wholly insolvent. In this connection we deem it proper to say we do not think that the provisions of section 602 of the Code contemplate a void judgment, but one which is voidable by reason of some fraud or irregularity. Such a construction, indeed, has, by the Supreme Court of the State of Iowa, been placed upon a section of the Iowa Code identical with said section 602. See Leonard v. Insurance Co. (Iowa), 70 N. W. Rep. 629. Yet while we think that the provisions of said section of the Code specially apply to voidable judgments, we do not doubt that one against whom a judgment has been rendered which is void for want of jurisdiction over it may have such judgment set aside, under the third subdivision of said section of the Code, as having been irregularly obtained. Our conclusion is that, while the insurance company had a remedy at law such remedy was not an adequate one; that, in order to avail itself of some of these remedies, it would have been compelled to sacrifice other legal valuable rights; and to have resorted to others it would have suffered damages for which it would have received no redress." "A final inquiry under the rule is whether the plight or condition in which the insurance company finds itself is in any wise attributable to its own neglect. We do not think it is. It is true that, while it had been advised that it had been sued in Valley county, it made no move to defend itself. But we are clearly of the opinion that this was neither negligence nor evidence of negligence. It was a State corporation, domiciled in Lancaster county, and by the very law of its creation could be sued only in that county, unless it had voluntarily established a place of business or appointed an agent in some other county for the transaction of its business. It was not guilty of negligence in failing to take notice of rumors, or even correct information, that it had been sued in a jurisdiction in which it did not reside, in which it was not suable, and in which it had no agent on whom service of process could be made. It was compelled to presume that the district court knew the law of the land, and it had the right to suppose that they would rule in accordance with the law. The decree of the district court is reversed, and a judgment will be entered here decreeing the judgment of the district court of Valley county to be absolutely void for want of jurisdiction over the person of the defendant therein, and perpetually enjoining the appellees and those claiming under them, from enforcing or attempting to enforce the collection of such judgment." It may be hoped that this decision, which cannot fail to meet with the approbation of members of the profession, will put a check upon practices such as seem to have been resorted to in the Valley county court, in this case, and recall to the attention of lawyers and litigants that plaintiffs having just causes may imperil or lose them by attempting to pervert the forms and processes of the courts, while those seeking to obtain an unjust advantage by such means will succeed only in putting themselves to costs and expenses for nothing.

PAROL EVIDENCE RELATIVE TO NEGOTIABLE SECURITIES.

The general rule of law is, that parol evidence is not admissible to contradict, vary, add to, subtract from, or otherwise modify the terms of a written contract. This law applies to promissory notes and other negotiable securities.[1] All precedent and contemporaneous agreements are held to be merged in such written contract.[2] However, in suits between third parties, strangers to the contract, or between a party and a stranger, parol evidence is admissible to vary

[1] De Long v. Lee, 73 Iowa, 53; Skillen v. Richmond, 48 Barb. 428; Mumford v. Tolman, 54 Ill. App. 471; Sheldon v. Heaton, 34 N. Y. Sup. 856; Catlin v. Harris, 7 Wash. 542; Bryan v. Duff, 12 Wash. 233; Hutchinson v. Hutchinson, 102 Mich. 635; Chicago, etc. Co. v. Swartzell, 61 Mo. App. 490.

[2] Adams v. Chicago, etc. Bank, 54 Ill. App. 672.

such contract.[3] The law, however, is unwilling that any of its rules should be allowed to work an injustice, and there are a number of well established exceptions to the above proposition. Parol evidence is admissible when the question of fraud or deceit in the written contract, is involved,[4] or to show that the consideration therefor was illegal.[5] As against a *bona fide* holder for value before maturity of a negotiable security but few such exceptions are allowed. When the statute declares the contract, which is evidenced by the negotiable security, to be void, or the security is not genuine, or is executed by one incapable of making such contract, there can be no recovery thereon, save as against one who by his indorsement is estopped to deny its validity. As between the immediate parties contracting relative to negotiable securities, it may be shown that there was fraud or illegality, there was no consideration for the contract,[6] that it was delivered conditionally or for a specified purpose,[7] or was entered into for accommodation,[8] or never went into effect, because it was delivered on a condition which was never fulfilled.[9] There are other cases where parol evidence has been admitted by some courts between the immediate parties to negotiable securities, for which various reasons have been assigned, while other courts have denied the admissibility of much of such evidence. To these cases we will call attention.

Ambiguity in Signature.—Where A makes his note and after his signature adds "agent," though it was held to be *prima facie* his own paper, yet as between the immediate parties it might be shown that he signed as agent for another.[10] Where a corporation made its note to "A, Pres.," who indorsed it in a similar manner, it was held that the note was made to him individually, that he indorsed it individually, that his indorsement was a complete contract, and parol evidence was inadmissible to vary it.[11] The general rule is, that the liability of the parties must be collected from the paper itself, and parol evidence is not admissible on the subject even between the immediate parties, and he will be charged, who, as collected from the instrument, was intended to be charged.[12] Many courts allow parol evidence when the paper is ambiguous and it is impossible to reconcile their differences. It was considered, that custom had so far established the form of and mode of signing a promissory note, that a signature at the bottom of it on the right hand corner was *prima facie* that of the maker thereof, and a signature at the bottom on the left hand corner was that of a witness, but parol evidence was admissible to show in what character the latter party signed.[13] Such signature near the left hand corner was held not to be evidence, that the party making it was a maker of the note, when another had signed it is the proper place as a maker.[14]

Ambiguity in Language. — When an instrument is not ambiguous, and the intent of the parties can be gathered from it, parol evidence is not admissible to show how one party construed it.[15] Where A signed a note and B and C signed a memorandum below the note, the intent of the parties being doubtful, and the language used admitting of more than one interpretation, parol evidence was admitted to show that the latter signed as sureties on the note.[16] This is held to extend to every written contract, and parol evidence is admissible to show the surrounding circumstances, the situation of the parties, the subject-matter, and sometimes acts done under it and even the conversations attending its negotiation,[17] but other authorities hold that such conversations are never admissible.[18]

Indorsement of Negotiable Security.—Some authorities hold, that the meaning and the legal effect of the blank indorsement of a

[3] Williams v. Fisher, 28 N. Y. Sup. 739; Clapp v. Banking Co., 50 Ohio St. 528: Horn v. Hansen, 56 Minn. 43; Fonda v. Burton, 63 Vt. 355.

[4] Howison v. Alabama, etc. Co., 70 Fed. Rep. 683.

[5] Groesbeck v. Marshall, 44 S. Car. 538.

[6] Bryan v. Duff, 12 Wash. 233; Keidan v. Winegar, 95 Mich. 430.

[7] Farwell v. Ensign, 66 Mich. 600.

[8] Keidan v. Winegar, *supra*.

[9] McCormick, etc. Co. v. Faulkner (S. Dak. Aug. 1895), 64 N. W. Rep. 163.

[10] Keidan v. Winegar, 95 Mich. 430; Shaffer v. Hoenschild, 2 Kan. App. 516.

[11] Hately v. Pike, 162 Ill. 241.

[12] Fuller v. Hooper, 3 Gray, 334; Williams v. Robbins, 16 Gray, 77.

[13] Camden v. McKoy, 3 Scam. 437; Aultman v. Gunderson, 6S. Dak. 226; Garrison v. Owens, 1 Pin. (Wis.) 471.

[14] Steininger v. Koch, 39 Pa. St. 263.

[15] Building, etc. Assn. v. Hamm (Tex. Civ. App. May, 1896), 36 S. W. Rep. 313.

[16] Bacon v. Dodge, 62 Vt. 460.

[17] Henry v. Agostini, 33 N. Y. Sup. 37.

[18] Scraggs v. Hill, 37 W. Va. 706; Crislip v. Cain, 19 W. Va. 438; Kriz v. Rad Pokrock, 46 Ill. App. 418.

negotiable security is so well settled by the law merchant, that such indorsement is as complete a contract as though all its terms were fully written out. They therefore hold, that no parol evidence is admissible to qualify or explain the legal liabilities assumed.[19] Where, however, a person, who is not a party to a note, indorses it before its negotiation, the meaning of his act is considered to be ambiguous, and parol evidence is admissible to show its true meaning.[20]

Contract only Partly Reduced to Writing.—It is admissible to introduce parol evidence to complete a contract where only part of its terms have been reduced to writing. This must not be understood to apply to contracts required by the statute of frauds to be in writing; there, no substantial part of the contract, can be supplied by parol evidence.[21] When is a contract complete? If it does not propose to be the whole contract,[22] or shows on its face that it is incomplete,[23] there is no difficulty. Where the contract states only one side of the agreement, and is the act of only one party, parol evidence has been held to be admissible.[24] It has been asserted, that when parties put their contract in writing, it is conclusively presumed, in the absence of accident, fraud or mistake, that their entire agreement is embraced in the writing.[25] The fact that the writing does not affirmatively show it was intended to express the whole contract has been deemed sufficient for the admission of parol evidence.[26] On the other hand, it was considered that such incompleteness must appear from the writing itself before parol evidence can be admitted.[27] It has been held, that if, upon inspection and study of the writing, read it maybe in the light of surrounding circumstances in order to its proper understanding and interpretation, it appears to contain the engagements of the parties and to define the object and measure the extent of such engagement, it constitutes the contract between them, and is presumed to contain the whole of that contract, and parol evidence is inadmissible. "For if we may go outside of the instrument to prove that there was a stipulation not contained in it and so that only part of the contract was put in writing, and then, because of that fact, enforce the oral stipulation, there will be little of value left to the rule itself."[28] As otherwise expressed, if the written contract appears to contain all the engagements of the parties on the subject, or to have been intended as a complete statement or performance of the whole contract, parol evidence is inadmissible.[29] Still it is evident, that the weight of authority is to the effect, that it is not necessary that the writing should show the contract to be incomplete, to let in parol testimony relative thereto.[30] Where a blank indorsement of a note is considered to be but a partial statement of the contract, or it is held that the contract by blank indorsed is a contract implied by law, parol evidence is admitted to qualify it.[31] A blank indorsement may be shown to be an indorsement without recourse.[32] A surety on a note was allowed to show that at the time he signed it the payee told him that he had sufficient funds of the maker to protect himself, that the signing by the surety was a mere matter of form, and he would not be called on to pay the note.[33] An indorser might show that he indorsed it in order that his agent might use it for a particular purpose, or for collection, or that he delivered the indorsed note as an escrow or for collateral security, or that such indorse-

[19] Bryan v. Duff, 12 Wash. 233; Kirkham v. Boston, 67 Ill. 599; Thompson v. McKee, 5 Dak. 172; Hately v. Pike, 162 Ill. 241; Knoblauch v. Foglesong, 38 Minn. 352; Johnson v. Ramsey, 43 N. J. Law, 279; Schmitz v. Hawkeye. etc. Co. (S. Dak. May, 1896), 67 N. W. Rep. 618; Specht v. Howard, 16 Wall. 564; Martin v. Cole, 104 U. S. 30; Allen v. Chambers (Wash. Dec. 1895), 43 Pac. Rep. 57; Youngblood v. Nelson, 51 Minn. 172.

[20] Hately v. Pike, 162 Ill. 241; Kellogg v. Iron City N. Bank, *supra*; Johnson v. Ramsey, *supra*; Featherstone v. Hendrick, 59 Ill. App. 497.

[21] Ringer v. Holtzclaw, 112 Mo. 519; Lecroy v. Wiggins, 31 Ala. 13; Carrick v. Mincke, 60 Mo. App. 140; Harmann v. Harmann, 70 Fed. Rep. 894.

[22] O'Neil v. Crain, 67 Mo. 250; Vaughan v. McCarthy, 63 Minn. 221.

[23] Ringer v. Holtzclaw, *supra*; Lecroy v. Wiggins, *supra*.

[24] Eighmie v. Taylor, 98 N. Y. 288.

[25] Holloway v. Wabash R. R., 62 Mo. App. 53.

[26] Catlin v. Harris, 7 Wash. 542.

[27] Hei v. Heller, 53 Wis. 415.

[28] Eighmie v. Taylor, 98 N. Y. 288.

[29] Graffam v. Pierce, 143 Mass. 386.

[30] Williams v. Fisher, 28 N. Y. Sup. 739; Bacon v. Poconoket, 70 Fed. Rep. 640; Harmann v. Harmann, 70 Fed. Rep. 894; Grand Rapids v. Works v. Forsythe, 83 Hun, 230; Harvey L. Co. v. Merriman & Co., 60 Mo. App. 214; Miller v. Goodrich, etc. Co., 53 Mo. App. 430; Graffam v. Pierce, 143 Mass. 386; Isaacs v. Jacobs, 8 N. Y. Sup. 344.

[31] Montgomery v. Page, 29 Oreg. 320; Ross v. Espy, 66 Pa. St. 481.

[32] Truman v. Bishop, 83 Iowa, 697; Harrison v. McKim, 18 Iowa, 485.

[33] First Nat. Bank v. Pegram, 118 N. Car. 671

ment was made to show that the note had been paid.[34]

Independent Collateral Contract.—In a suit on a negotiable security between immediate parties thereto, which are the only kind of suits considered in this article, many authorities allow evidence of contemporaneous oral contracts to be introduced. They claim that such contracts being collateral, the rule against the admisson of oral evidence to affect written contracts is not violated. They qualify the admission of such evidence by a requirement that it must not be inconsistent with the written contract.[35] When A and B contracted in writing to assign 150 bonds of a certain corporation to C, parol evidence was admitted to show that, if A individually transferred the 150 bonds, it was agreed C should return 75 of them to him.[36] Where A was sued by B, the payee, on his promissory note, A was allowed to show by parol that this note was given in consideration of an assignment by B of a claim on third parties, and was only to be enforced out of the proceeds realized from such claim.[37] In a suit on a note the maker was allowed to prove by parol that it was agreed by the plaintiff, the payee, at the time of its execution, that he could have the right to off set an account then due him.[38] Where the payee sued the makers of a promissory note, defendants were allowed to show that they signed the notes as sureties for comakers, which was known to the payees, and thereby they escaped all liability, because the plaintiff had granted an extension to their comaker without their consent.[39] It seems to the writer very illogical to claim that such parol contracts do not vary or affect the written contract. A contract does not mean a mere collection of words, but also includes the legal rights growing out of it. If I hold a written contract—a promissory note with three joint makers—under which I may grant an extension to any of the makers without prejudicing my rights against any of the three, certainly a parol contract, which takes away that right as to two of such makers, varies and affects my written contract.[40] Other courts refuse to allow such evidence to be introduced.[41] Makers of a note were not allowed to show, that they signed the note as cosureties for a comaker, to whom the money was to be paid solely for the purpose of buying cattle, and that a mortgage should be taken on such cattle.[42] To a suit by the payee on a promissory note the maker was not allowed to show, that such note was given for a half interest in certain mines purchased in their joint names by the payee, and that he was to have time to examine and test the mines, and if he did not like them his note was to be returned to him.[43] A blank indorser was not allowed to show a parol agreement by the payee, that he should not be held liable.[44] A maker of a promissory note was not allowed to show, that the note was given for an interest in a patent machine and was only to be paid from the profits realized from the sale of such machine.[45] It cannot be shown, that by parol agreement a promissory note payable on its face one day after date was to become due only after the sale of certain lots of ground.[46] A party sued on a note cannot set up a parol contemporaneous agreement by the payee, that he would save him harmless and satisfy himself out of property already in his hands.[47] Where A gave B a promissory note agreeing to pay her semi-annually $75 so long as she lived, he was not allowed to show a contemporaneous parol agreement, that, if she did not require the money for her support, he was not bound to supply it.[48] It would be more logical to admit such evidence on the ground that such matters relate to the consideration of the contract, and that parol evidence is by general agreement admissible to show the true consideration of a written contract even in opposition to its terms. Such reasons have

[34] Tombler v. Reitz, 134 Ind. 9.

[35] Catlin v. Harris, 7 Wash. 542; Miller v. Goodrich, etc. Co., 53 Mo. App. 430; Fusting v. Sullivan, 41 Md. 162; Eighmie v. Taylor, 98 N. Y. 288; Snow v. Alley, 151 Mass. 14; Lanius v. Shuber, 77 Tex. 24; Getto v. Binkert, 55 Kan. 617.

[36] Snow v. Alley, 151 Mass. 14.

[37] Isaacs v. Jacobs, 8 N. Y. Sup. 344.

[38] Bennett v. Tillmon, 18 Mont. 28.

[39] Arbuckle v. Templeton, 65 Vt. 205; Keidan v. Winegar, 95 Mich. 430; First Nat. Bank v. Skidmore (Tex. Civ. App. March, 1895), 30 S. W. Rep. 564; Vestal v. Knight, 54 Ark. 97.

[40] See cases just cited.

[41] Chicago, etc. Co. v. Swartzell, 61 Mo. App. 490.

[42] Lanius v. Shuber, 77 Tex. 24.

[43] Dulaney v. Burke, 2 Idaho, 686.

[44] Altman v. Anton, 91 Iowa, 612; Thompson v. McKee, 5 Dak. 172.

[45] De Long v. Lee, 73 Iowa, 53.

[46] Getto v. Binkert, 55 Kan. 617.

[47] Stewart v. Albuquarque Nat. Bank (Ariz. Feb. 1891), 30 Pac. Rep. 303.

[48] Osborne v. Taylor, 58 Conn. 439.

been assigned in addition in some of the decisions.[49] The admission of such evidence, no matter what reason is assigned for such admission, seriously impairs the rule, that parol evidence is not admissible to add to, or vary, a written contract.[50]

Contribution.—On the ground that the contract of indorsers or joint makers is independent of, or collateral to, the contract between the two parties to a negotiable security, or that an indorsement is an implied contract, or one but partly reduced to writing, many courts have allowed them to show the special contracts existing between themselves. It is said that, in the absence of any contract between themselves, the law makes indorsers liable to each other in the order of their signatures,[51] yet they may show they were sureties one for the other or were cosureties, and entitled as between themselves to indemnification or contribution.[52]

St. Louis, Mo. S. S. MERRILL.

[49] Le Grande Nat. Bank v. Blum, 26 Oreg. 49; Eighmie v. Taylor, 98 N. Y. 288; Isaacs v. Jacobs, 8 N. Y. Sup. 344.

[50] Eighmie v. Taylor, 98 N. Y. 288; Johnson v. Ramsey, 43 N. J. Law, 279.

[51] Kiel v. Choate, 92 Wis. 517; Farwell v. Ensign, 66 Mich. 600; Kiedan v. Winegar, 95 Mich. 430; Ross v. Espy, 66 Pa. St. 481; Burke v. Conger, 8 Tex. 66; First Nat. Bank v. Skidmore (Tex. Civ. App. March, 1895), 30 S. W. Rep. 564.

[52] Montgomery v. Page, 29 Oreg. 320; McCune v. Belt, 45 Mo. 174; Vestal v. Knight, 54 Ark. 97; Balkeley v. House, 62 Conn. 459.

CRIMINAL LAW—EVIDENCE OF ALIBI.

STATE v. SHIVE.

Supreme Court of Kansas, December 11, 1897.

Where two persons jointly accused of a crime defend upon the ground of absence at the time of its commission, but testimony is offered tending to prove their presence at a point a few miles from the scene of its occurrence a few hours previous to its commission, it is error to receive in evidence a mailed envelope, addressed to one of them, and having on it the return card of the other, where its genuineness as sent by one and received by the other is not shown, nor the connection of the receiver with it shown by proof of its previous possession by him, or inferable from any other fact than his name and address written thereon.

DOSTER C. J.: This is an appeal from a sentence of conviction for robbery. Just after dark on the 23d of February, 1897, two masked men entered the house of Jacob Willems, a farmer, residing in the northeastern part of Reno county, and robbed him and his son Jacob J. Willems. They took $85 or $90 in gold and paper currency belonging to Jacob Willems, and $1.18 of silver and pennies which belonged to Jacob J. Willems, the son. A few days after the robbery, a neighbor of the Willemses found some pieces of paper near a haystack, about 3 1-2 miles miles south of their house. These pieces of paper were pasted together by the finder, and appeared to form an envelope addressed to the defendant Shive, at North Market street, Wichita, Kan., on which street he lived, with a card of directions to return to an unspecified number East Tenth street, Hutchinson, Kan., on which street the defendant Underwood lived. It was stamped and postmarked at Hutchinson, but the date of mailing was too indistinct to be read. At the trial three or four persons identified the defendants as having been seen on the afternoon of the robbery at the haystack where the pieces of envelope were found. There was no evidence that this envelope had ever been in the possession of either of them. There was no evidence that the writing upon it was the writing of either of them. There was no evidence to connect the envelope, its contents, or the writing upon it with either of them. The only evidence which connected either of the defendants with the pieces of paper found at the haystack, and pasted together, and introduced in evidence, was the testimony of the three or four witnesses who claimed to have seen them at the haystack of the afternoon of the day in the evening of which the robbery occurred.

The defendants objected to the introduction of the envelope, because incompetent, irrelevant, and immaterial, and because it had not been connected with either of them by proof of their ownership or possession of it, nor by proof of their handwriting upon it. These objections were overruled, the court remarking at the time, "They are only competent as a circumstance." A number of witnesses testified that the defendants were present in the city of Hutchinson at the hour when the offense was committed, and that they were present there at the time the witnesses for the State identified them as being at the haystack where the pieces of envelope were found. The admission in evidence of this envelope constitutes the ground of the principal claim of error. No case directly in point has been called to our attention, but we are constrained to say that the admission of this torn envelope in evidence was error. It was admitted as a circumstance to prove that the defendants were in the vicinity of the place where the crime was committed a short time before its commission, and not in the city of Hutchinson at that time, as testified to by some of the witnesses. If there is that logical connection between it and the defendants which satisfies the rigid requirements of the criminal law, its admission was proper; otherwise, not.

A robbery having been committed, and the defendants being charged with its commission, proof of the fact that they were in the vicinity

where it occurred was, of course, logically pertinent. Pieces of paper were found at a point a few miles from the scene of the crime. When they were put together, the name of one of the defendants and his post office appeared addressed thereon, and the return card of the other defendant likewise appeared on it. No evidence was offered showing that the defendant to whom the envelope was addressed was ever in its possession, nor was any evidence offered tending to show that the other defendant addressed the envelope to him, or that the two defendants were or ever had been in correspondence with each other. The jury, however, were permitted to infer that, because this envelope thus unconnected with the defendants was found at a place where they had been seen the day of the crime, they were there, and had left the paper at the place where found. Admitting for the moment that the inference can be made against the defendant Shive, because the envelope was addressed to him, can it be made against the defendant Underwood, who addressed it to him, and who, upon mailing, parted with it, and from thence became entirely disconnected from it? It cannot be that such inference exists as to him. Nor does the inference appear less doubtful as to the defendant Shive, when the question is closely viewed. If the envelope had been seen in his possession at any time, it might be different. If the address upon it had been identified as the handwriting of the defendant Underwood, and it had been shown that they were in correspondence, the case might be different; but neither of these circumstances, nor any circumstance connecting Shive with the receipt or possession of the envelope, was shown. If a pocketbook had been found at the haystack, and identified as belonging to Shive, there would be an inference that he had dropped it there. If a handkerchief proved to belong to him or a piece of clothing matching clothing worn by him had been found at the place in question, there would be an inference derivable therefrom that he was at the place; but, where no such connection between the defendant and the article found has been proved, the inference of his presence at the place where found is not deducible. No connection between the defendant and the paper being shown, he was unable to explain it. The State never having shown that he had it or was responsible for it, he was not called upon to explain how he parted with it, or how it came to be at the place where found. The presumption that, according to the known course of the postal service, an addressed and stamped letter reaches its destination, and is received by the person to whom addressed, will not, in our judgment, suffice to show that the envelope inclosing such letter, found thereafter many miles from the place of residence of the addressee, was left by him at the place where found. Letters of correspondence are frequently preserved, but the envelopes inclosing them are rarely retained, according to the habit of most persons. We are not permitted, at least against a person accused of crime, to tack one presumption upon another, and from the series infer guilt against him. The very contrary is the rule.

"The facts alleged as the basis of any legal inference must be clearly proved, and indubitably connected with the *factum probandum*. No weight, therefore, must be attached to circumstances which, however they may excite conjecture, do not warrant belief. Occurrences may be mysterious, and justify vehement suspicion, and yet the supposed connection between them may be but imaginary, and their coexistence indicative of accidental concurrence merely, and not of mutual correlation. Every circumstance, therefore, which is not clearly shown to be really connected as its correlative with the hypothesis it is supposed to support must be rejected from the judicial balance; in other words, it must be distinctly established that there exists between the *factum probandum* and the facts which are adduced in proof of it a real connection, either evident and necessary, or so highly probable as to admit of no other reasonable explanation." Wills, Circ. Ev. 173, 174. "The fact that an unanswered letter or other paper is found in the custody of a party, but not acknowledged by him, is not ground for the admission of the paper as evidence against him. Were it admitted, an innocent man might, by the artifice of others, be charged with a *prima facie* case of guilt, which he might find it difficult to repel." Whart. Cr. Ev. § 682. "In a portmanteau, not proved to belong to the prisoner on trial, was found a paper folded like a letter, and containing on the inside what purported to be an inventory of goods pawned at different times. The inventory was not in his handwriting; but on the outside of the paper his name, and the word 'Private,' both in his handwriting, were indorsed. It was ruled that the contents of the paper were not admissible against him." Reg. v. Hare, 3 Cox Cr. Cas. 247. "A letter found on the person of the defendant when arrested for robbery, containing damaging statements and warnings to keep out of reach of the officers, and identified by a witness as having been written by him to defendant, is inadmissible, in the absence of evidence that defendant answered it or acted on the information contained therein." People v. Colburn (Cal.), 38 Pac. Rep. 1105.

Other claims of error are made. We have examined them, but do not find any of them well founded. For the error pointed out, however, the sentence of conviction is reversed, and a new trial ordered. All the justices concurring.

NOTE.—*Recent Decisions on Subject of "Alibi."*—On indictment for the theft of a cow, defendant introduced evidence to prove an *alibi*. The only charge on the question of *alibi* was as follows: "If the jury believe from the evidence that the defendants were at the place of B at the time the witness F says he saw them in the pasture in the afternoon, the defendant should be acquitted:" Held that, the burden being upon the State to prove defendant's presence at the place of the theft, the charge was erroneous. Bennett v. State (Tex. App.), 17 S. W. Rep. 545. It is error to

instruct the jury that, when the defense of an *alibi* is relied on, it rests on defendant to establish such defense to the reasonable satisfaction of the jury. State v. Wollard (Mo. Sup.), 20 S. W. Rep. 27. Proof of an *alibi* is sufficient to acquit if, considered in connection with all the testimony, it raises a reasonable doubt of the presence of accused at the commission of the crime; and it is error to charge that it is necessary that it should satisfy the jury that the crime could not have been committed by the person offering proof of an *alibi*. Murphy v. State (Fla.), 12 South. Rep. 453. An instruction to find defendant not guilty if, at the time the offense was committed, he was at a place other than where it was committed, is erroneous, since the law does not require his absence to be established, but he is entitled to an acquittal if there is a reasonable doubt that he was present. State v. Taylor (Mo. Sup.), 22 S. W. Rep. 806. The defense of *alibi* being covered by the general plea of not guilty, and the accused, on a trial for arson, in his statement to the court and jury, having said that at the time of the burning he was in his house asleep, and the evidence showing that his house was a quarter of a mile or more from the scene of the offense, it was not error to instruct the jury on *alibi*, as a defense set up in the case, and that the burden of proving it was upon the accused. Westbrook v. State (Ga.), 16 S. E. Rep. 100. On the question of an *alibi*, the court instructed the jury: "If you believe that the evidence clearly sustains this defense, or raises in your minds a reasonable doubt of defendant's guilt, you must acquit:" Held, that the instruction gave defendant the benefit of all his legal rights; the rule being that the burden of proof is on defendant to establish an *alibi*. Territory v. Trujillo (N. Mex.), 32 Pac. Rep. 154. On the trial of a criminal case, it was error to charge the jury that, "when defendant attempts to set up an *alibi*, the burden is on him to satisfy you, beyond a reasonable doubt, that the *alibi* is true." Miles v. State (Ga.), 19 S. E. Rep. 805. Where the defense is an *alibi*, it is not error to charge that the burden of showing an *alibi* is on defendant; but if, on the whole case, the testimony raises a reasonable doubt that defendant was present when the crime was committed, he should be acquitted. Ware v. State (Ark.), 27 S. W. Rep. 485. Where the defense is an *alibi*, a charge that it is essential to the proof of an *alibi* that it should account for the whole of the time of the transactions in question, or at least so much of it as to render it impossible that the prisoner could have committed the imputed act, is erroneous, since it violates the rule that defendant is entitled to an acquittal if the whole evidence causes a reasonable doubt as to his guilt. Beavers v. State (Ala.), 15 South. Rep. 616. An instruction that "the burden of proof was on defendant to establish his *alibi*, and that it must be done to your satisfaction," exacts too high a degree of proof. Prince v. State (Ala.), 14 South. Rep. 409. On a murder trial, where the defense is an *alibi*, it is error to instruct that defendants' failure to account for their absence during all the time within which the alleged crime was committed, may be considered as a circumstance proving guilt, since the burden is on the State throughout, and defendants are not bound to explain anything. Parker v. State (Ind. Sup.), 35 N. E. Rep. 1105. When the defense is an *alibi*, an error in refusing to instruct that a reasonable doubt may properly arise from a consideration of the *alibi* evidence, is not cured by a general charge on the subject of reasonable doubt. Fleming v. State (Ind. Sup.), 36 N. E. Rep. 154. On a trial for rape, defendant relied on the defense of an *alibi*. The jury was instructed to acquit if, at the time of the offense, defendant was at a place other than where it was committed: Held erroneous, as the burden was on the State to prove defendant's presence at the place of the offense, and the error was not cured by the general charge as to reasonable doubt. State v. Taylor (Mo. Sup.), 24 S. W. Rep. 449, 118 Mo. 153. Where there is evidence supporting the defense of an *alibi*, a refusal to instruct on such defense is error. Tittle v. State (Tex. Cr. App.), 31 S. W. Rep. 677. Where there is testimony that the accused was so far removed from the place of the crime at the time of its commission as to make it impossible that he could have committed it, the court should instruct the jury on the law of *alibi*. State v. Conway (Kan. Sup.), 40 Pac. Rep. 661. Where defendant swears that he was not at the place of the homicide when deceased was killed, and had nothing to do with the killing, and the court fails to charge the law with reference to an *alibi*, a conviction will be reversed. Anderson v. State (Tex. Cr. App.), 31 S. W. Rep. 673. It was not error to omit to instruct with reference to an *alibi* where the murder occurred about 8 o'clock, and there was no testimony as to the whereabouts of defendant from 7:30 to 8:15 o'clock, and the defendant could have committed the deed in that time. State v. Seymore (Iowa), 63 N. W. Rep. 661. Where defendant introduces evidence tending to show an *alibi*, it is the duty of the court to instruct the jury on that subject, though counsel for defendant may insist that such evidence was not introduced to prove an *alibi*, but only to contradict other evidence offered by the State. Garcia v. State (Fla.), 16 South. Rep. 223, 34 Fla. 311. Though the court charged that the burden of proof was on defendant to establish his *alibi* to the "reasonable satisfaction" of the jury, the error, if any, was cured where the jury were elsewhere instructed that, whenever the evidence of an *alibi* creates a reasonable doubt as to defendant's guilt, he should be acquitted, and particularly where there was no request for an explanatory instruction on the words "reasonable satisfaction." Towns v. State (Ala.), 20 South. Rep. 598. On the question of *alibi*, it is proper to instruct that if, "in view of the evidence, the jury have any reasonable doubt as to whether defendant was at some other place at the time the crime was committed, they should give the defendant the benefit of any doubt," and acquit him. People v. Resh (Mich.), 65 N. W. Rep. 99. An instruction that defendant is not required to prove an *alibi* beyond a reasonable doubt; that, although the evidence of an *alibi* falls short of the weight of moral certainty, yet if it leaves in the minds of the jury such a doubt or uncertainty that, if taken by itself, they could not find for or against an *alibi*, then the jury must carry such doubt into the case of the prosecution, and array it there as an element of reasonable doubt, beyond which the prosecution must establish guilt; that the defendants are entitled as much to the benefit of such doubt as to any other doubt raised by the evidence, and if its weight alone, or added to that of any other doubt, be sufficient to raise a reasonable doubt as to defendant's guilt, etc., the jury must acquit, is sufficient. State v. Taylor (Mo. Sup.), 35 S. W. Rep. 92. In a criminal case, where defendant attempted to show an *alibi*, an instruction that such defense "is as legitimate and valid as any other defense, nor is the defendant bound to establish this defense beyond a reasonable doubt; and if, from the whole evidence, you have a reasonable doubt of his presence at the commission of the offense, as before explained, you must give him the benefit of that doubt, and ac-

quit," is sufficiently explicit to show defendant's rights under that defense. State v. Bryant (Mo. Sup.), 35 S. W. Rep. 597.

JETSAM AND FLOTSAM.

THE LAST OF THE BARONS.

The death of Sir Charles Edward Pollock a few days since removed the last of the English barons of the exchequer. For the first time in about 600 years the title "Baron" is missing from the roll of English judges. In the words of the "*London Law Journal:*" "We cannot help regarding it as a matter for regret that so ancient a title shall no longer be borne by any member of the bench." But Baron Pollock was worthy to stand in history as the last of the name by whom the type should be remembered. His service on the bench, lacking only a few days of twenty-five years, earned the apparently unanimous tribute of bench and bar that "he illustrated in his own person the highest traditions of the bench," that he was "an upright judge whose great desire was to do justice," "a very learned judge, a very conscientious, upright, and painstaking judge," "a judge possessing great judgment and fine discretion," and that "the kindness and consideration which never failed him under any circumstances of weariness, of irritation, or annoyance enabled him to show how an English judge could exhibit in his highest office the finest characteristics of an English gentleman." Honorable pride in his distinction as "the last of the barons" led him to decline a higher position in the court of appeal. He was a son of Chief Baron Pollock, and it is said that his family has supplied the bar with a greater number of distinguished men than any other.

ACTION FOR CAUSING DISCHARGE OF EMPLOYEE.

The long expected decision of the house of lords in the case of Allen v. Flood has been received in this country as well as in England with a degree of interest that it undoubtedly deserves. The case has been recently discussed in so many publications that it is perhaps unnecessary to recapitulate the facts. The point decided appears to be (so far as can be ascertained from the partial report in 4 Times L. R. 125) that an action will not lie against an individual defendant for causing the discharge of the plaintiff by the latter's employer, if the defendant has not committed or caused to be committed, any act which would be of itself unlawful, without regard to the motive with which it might have been done. Apart from the great practical importance of the decision as a precedent in the numerous cases now arising with regard to trades unions, the reasoning of the majority in the house of lords is of extraordinary interest as affecting the fundamental theory of the law of torts.

There is a view, more or less clearly set forth in the opinions of many judges and the writings of many legal authors, in both England and in this country, that when a plaintiff has proved that the defendant has intentionally caused him to suffer pecuniary damage, he has shown a good cause of action, unless the defendant shows some ground of justification. A broad general privilege of every person to conduct his affairs as he chooses, and in particular to manage his business in whatever way seems most profitable, is considered to furnish sufficient justification in almost all cases where the defendant has not made use of fraud, violence, or other means conceded to be illegal apart from the motives by which it may be directed. Where the question of the defendant's responsibility for his acts has been approached in this manner, however, it has almost always been declared, either by implication or by direct words, that this justification would not extend to cases where mere personal spite, or other wholly improper considerations, furnished the sole or predominant motives for the defendant's acts. The presence of this gap in the whole range of acts of intentional infliction of damage, between the class of acts which are unlawful without regard to motive and those which are, in point of law, wholly justifiable and lawful, is what gives practical importance to this whole view of the theory of the law of torts. That there was such a gap, was expressly stated, not only by the court of appeal in the case under discussion (Flood v. Jackson [1895], 2 Q. B. 21, and in Temperton v. Russell [1893], 1 Q. B. 715), but also by several of the judges and law lords in Mogul Steamship Co. v. McGregor, 23 Q. B. Div. 598 (1892), App. Cas. 25, where the decision upon the facts of the case was in favor of the defendant. And the existence of such a gap has been assumed, if not expressly asserted, in a great number of American cases, extending from Walker v. Crownin, 107 Mass. 555, to the very recent case of Oxley Stave Co. v. Hoskins. See 56 Alb. Law Jour. 400.

Now the decision in Allen v. Flood seems to cut in back of the whole modern theory just stated, and render all discussion of what constitutes justification or privilege, outside of the cases of recognized affirmative defenses, of little practical value. The majority distinctly lay down the proposition that an act which is not in itself unlawful apart from the motive of the person doing it, as falling within some of the ancient and tolerably well-defined classes of wrongful acts, cannot render a man liable to an action at law, however bad the motives on which he may have acted, and however serious the loss he may succeed in inflicting upon others. The existence of the gap above referred to, which admits of some acts being considered tortious on account of the bad motive accompanying them, is altogether denied. It may be maintained, of course, that this amounts to saying that the privilege of doing as one chooses sweeps back to the boundaries of fraud and violence. The court, however, do not so treat the question; they do not go into any question of justification, because they recognize no *prima facie* wrong.

That this doctrine of Allen v. Flood is simple, convenient in practice, and in accord with a conservative view of the spirit of the common law, seems almost undeniable. Though many will argue that it impairs the invaluable elasticity of the common law, and will keep out of the courts many cases in which the conditions of modern society demand judicial interference even though such interference may in some respects appear difficult and dangerous.

Radical as is the decision in Allen v. Flood, it leaves a loophole through which the doctrine that unjustifiable motives can be the determining element in a tort might, even in England, come back into the law. In that case there was no combination of several defendants to commit the acts complained of. It is expressly recognized, in at least two opinions, that the presence of an element of conspiracy might make a very material difference. If such an element can, as a matter of law, make that illegal which would not be illegal without it, all the questions as to "malice" and unjustifiable motives can come before the courts in the same form as before, whenever there are several defendants. In England it appears to be likely that conspiracy will not be held to furnish a cause of

action in any case where an action would not lie against a single defendant according to the doctrine of Allen v. Flood; to that effect, at any rate, is a decision in a court of the first instance (Huttley v. Simmons, 14 Times L. R. 150), following immediately after the announcement of the decision in the house of lords. In this country there have been so many decisions holding defendants liable for what the courts consider malicious interference with the plaintiff's business, that it seems probable that the judges will pay little respect to Allen v. Flood, beyond distinguishing it as without the element of conspiracy which has been present in all the American cases and hereafter giving more attention to this last point. The most satisfactory method of dealing with this whole subject, it may be suggested, is that now likely to be adopted in England, by simply making the more objectionable forms of boycotting criminal offenses, and giving up all attempts to stretch the law of torts to cover cases lying outside of the clearly recognized classes of actionable wrongs.—*Harvard Law Review.*

BOOK REVIEWS.

CENTURY EDITION, AMERICAN DIGEST.

The completion of this series of digest, of which this is the initial volume, marks an era in the history of American legal literature. The United States Digest, wherein were comprehended the digests of all American cases from the earliest period, was in the shape of fourteen original volumes, supplemented by one volume each year up to and including the year 1886. These digests were, in many respects, defective and unsatisfactory, as practitioners who have been compelled to depend upon them, for the reason that there was nothing else at hand, will readily recall. Beginning with the year 1887, the West Publishing Co. undertook the work of preparation of yearly digests, the character and features of which were much of an improvement upon those that proceeded. With each year these annual digests, known as the American Digest, have shown steady growth and improvement as a result of knowledge of methods gained by experience, until now the American Digest may be said to be the perfection of legal digesting. This series which is now intended to supplant all the earlier volumes up to the year 1896, will, of course, contain a complete digest of all reported American cases from the earliest times to the year 1896. Volume one before us includes the subjects Abandonment to Advocate. It is prepared in much the same style and has all the excellent features of the American Digest. The body of American case law now includes more than 500,000 reported cases, and is embraced in about 5,000 volumes of "official" and *quasi* official reports, and nearly 1,000 volumes of reporters, reprints and "selected cases," besides a great mass of periodicals and miscellaneous legal publications. Naturally a complete digest to these is invaluable to the practitioner. From whatever side of the subject search may begin, it is guided by the most direct route to the particular point sought. The scope note shows just what is included under each heading, the analysis shows the arrangement of the matter and gives direct reference to the pages where the digest paragraphs are to be found. The cross-references show where to look for matter related to the subject but excluded from this space by the scope note, while the typographical arrangement of the digest proper is such as to make search easy and reference direct. Citations are given to all the "official" and *quasi* official reports, and also to the National Reporter System, United States Supreme Court Reports, American Decisions, American Reports, American State Reports, Lawyers' Reports Annotated, etc. The Century Digest will be completed, it is estimated, in between fifty and fifty-five volumes. It will come down to 1896, inclusive, and the American Annual Digest for 1897 will therefore connect with it exactly without duplication or omission. The manner in which this digest has been prepared is in every way satisfactory, and we cannot too warmly commend it to every practitioner as being the most comprehensive, accurate and valuable reference work to American case law that is extant. It is published by West Publishing Co., St. Paul.

WAIT ON FRAUDULENT CONVEYANCES.

This is the third edition of a meritorious work upon an important subject. Considerable has been added to the text of the last edition, over one hundred and eighty pages of entirely new matter having been written, and the citation of authorities increased several thousand over the number contained in the former edition. The book treats not only of fraudulent conveyances in all the forms and devices which are used to effectuate such transfers, but also of creditors' remedies and creditors' bills generally. The style of the author is exceedingly clear and lucid, and the citation of authorities exhaustive. It is a handsomely printed book of over eight hundred pages. Published by Baker, Voorhis & Co., New York.

ALGER ON PROMOTERS AND THE PROMOTION OF CORPORATIONS.

The character, plan, and scope of this work is best disclosed by the author, who says in the preface that "the public is constantly responding to the invitations of promoters of corporate enterprises to contribute the funds necessary for their prosecution. Very large sums of money in the aggregate are annually invested in such ventures by persons who must necessarily rely more or less upon the good faith and integrity of those engaged in promoting them. The promoters have in their hands the creation and moulding of the corporation; they have the power to define how and when, and in what shape, and under what supervision it shall start into existence and begin to act as a corporation. The material facts in relation to the undertaking are also exclusively within their knowledge. In view of these conditions it is apparent that the question of the reciprocal rights and obligations of the promoter and the corporation, and of the shareholder and the promoter, is of great practical importance, and it would seem to be worthy of fuller treatment than that which has been accorded to it in the text books on the law of corporations. In the absence of any treatise on the subject, the writer submits this work to the profession, in the hope that the attempt to do what so far has been left to a great extent undone, namely, to analyze the cases and to state and classify the principles deducible from the cases may prove useful." In successive chapters the book treats of the nature of promotership and relation of promoters to the corporation, of the duties of promoters to the corporation, of accountability of promoters to the corporation for profits, gifts and commissions, of the measure of profits recoverable by corporations, of fraud by promoters as ground for recovery of damages from them by corporations and for

procuring the setting aside of executed contracts entered into by it, of suits by shareholders to compel redress for wrongs by promoters to the corporation, of the liability of promoters to account for profits, commissions and gifts or any damages to shareholders of the corporation, of the liability of promoters to subscribers for shares in a projected corporation which proves abortive, remedies of subscribers for shares against corporations when misled by misrepresentations made by promoters, of the rights and liabilities of corporations on promoters' contracts. The design of the book is cleverly executed, the text being clear and well written. The citation of authorities is extensive and the book is in every regard to be commended. Published by Little, Brown & Co. Boston.

PATTISON'S COMPLETE MISSOURI DIGEST, VOL. 1.

For a long time practitioners in the Missouri courts have been considerably inconvenienced by the absence of a complete digest of cases determined by the courts of that State. This has resulted from the fact that reference, in that direction, has had to be made to some half dozen volumes of digests, beginning with, first, Pattison, then Stark, then McQuillin, and ending with the new Pattison, each volume bringing the information down to certain date. The inconvenience of this, not to say anything about the cost of obtaining all of such volumes, has been seriously felt. Then, again, for more than two years there has been no digest whatever, and the practitioner has been obliged to pursue a lengthy search through all the later volumes of reports. For these reasons the bar of the State will, no doubt, welcome this new and complete digest which will include all cases determined by the supreme court and the St. Louis and Kansas courts of appeal, from the beginning to, and including, volume 137 of the supreme court, and volume 69 of the court of appeals.

Though only the first volume has, so far, made its appearance, the others will shortly follow. It is to be in four large volumes. The volume before us comprehends subjects from A to D. As to the manner in which the work of digesting has been done, it is impossible to speak in anything but complimentary terms. The digests, it is evident, are not merely the head notes of the cases, but, wherever thought necessary, have been rewritten or enlarged. The points of the cases are expressed in concise and clear language. The arrangement of subjects and subheads is satisfactory, and no proper cross-references seem to be omitted. We have made repeated tests, and will bear witness to a high degree of accuracy in the citation of cases and statements of the rulings of courts. The reputation of the compiler, Mr. Everett W. Pattison, as an able practitioner in the courts of the State, and his large experience in the preparation of the various digests with which his name has been associated, is an assurance of the meritorious character of the present work.

As to the mechanical excellence of the work, we cheerfully testify. The type in which the digests are printed is clear and easily read. The subjects and subheads are printed in large black letter type, which much facilitates the searcher in his examination. The volume of nearly one thousand pages is handsomely bound. Published by Gilbert Book Co. St. Louis.

HUMORS OF THE LAW.

First Countryman—"Who be th' gentleman wot's taken the squire's 'ouse, Jim?"

Second Countryman—" 'E bean't no gentleman; 'e be a lawyer."

"How came you here?" said the visitor to a prisoner in the penitentiary.

"I was brought here by my convictions," was the firmly spoken reply.

In arguing a point before a judge of the supreme court, Col. Folk, of the mountain circuit in North Carolina, laid down a very doubtful proposition of law. The judge looked at him for a moment and queried:

"Col. Folk, do you think this is law?"

The colonel gracefully bowed and replied:

"Candor compels me to say that I do not, but I did not know how it would strike your honor."

The judge deliberated a few minutes and gravely said:

"That may not be contempt of court, but it is a close shave."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ADMINISTRATION—Administrator—Appointment.—Where a clerk issues letters of administration to one person, who qualifies, his powers in that respect are exhausted, as to that estate; and a subsequent appointment of another by him, without the letters of the former being revoked, is void.—IN RE BOWMAN'S ESTATE, N. Car., 28 S. E. Rep. 404.

2. ASSIGNMENT FOR BENEFIT OF CREDITORS—Conveyance by Assignee.—An assignee for the benefit of creditors is the legal owner of the real estate of his assignor, and, upon selling it, is a "grantor," within Laws 1888, ch. 69, § 8, providing that as between the grantor and grantee of any property, when there is no express agreement in writing as to which shall pay the taxes that may be assessed thereon, if said property is conveyed on or after the 1st day of January, then the grantor shall pay the taxes thereon for that year.—CAREY V. FOSTER, Wyo., 51 Pac. Rep. 206.

3. ATTACHMENT — Sheriff as Garnishee. — Property taken by an officer from a prisoner is not subject to attachment at the suit of a creditor of the prisoner, if it was taken from him without authority; and it is not subject to attachment, at least till after conviction of the prisoner, where it is taken from him by authority of law.—HOLKER V. HENNESSEY, Mo., 42 S. W. Rep. 1090.

4. BAILMENT—World's Fair.—The management of a world's fair, to which all nations are invited to send their choicest products, is charged with the duty of safeguarding the exhibits of foreign nations and their citizens with the highest intelligence and protection compatible with the ephemeral character of the fair buildings. This obligation cannot be avoided by the promulgation of regulations that precautions would be taken for the safe preservation of all exhibits, but that the exposition company would not be liable for loss or damage, however occurring.—FRENCH REPUBLIC V. WORLD'S COLUMBIAN EXPOSITION, U. S. C. C., N. D. (Ill.), 83 Fed. Rep. 110.

5. BENEVOLENT SOCIETY — Insurance — Interest.—A beneficiary has no vested rights under a certificate in a company whose by-laws provide that a member in good standing may surrender his certificate and have a new one issued to a different beneficiary.—LANE V. LANE, Tenn., 42 S. W. Rep. 1058.

6. BILLS AND NOTES—Discount.—Under a bank charter providing that certain classes of promissory notes and bills of exchange shall, "when discounted" by the bank, be upon the footing of foreign bills of exchange, a note is "discounted" by the bank when it deducts from the face of the note in advance the interest until maturity, and places the balance to the credit of the makers.—EASTIN V. THIRD NAT. BANK OF CINCINNATI, Ky., 42 S. W. Rep. 1115.

7. BILLS AND NOTES—Installment Notes—Collateral Security.—An indorsee holding notes as collateral security must show how much had been paid on the indebtedness which the notes were given to secure, and what other security he has as against the maker, having a defense against the payee.—HARRINGTON V. CLAFLIN, Tex., 42 S. W. Rep. 1055.

8. BILLS AND NOTES—Reply and Rejoinder.—An answer denying that defendant signed, executed or delivered the note sued on, or authorized any one else to do so for him, does not require a reply, and therefore a reply alleging that defendant signed the note by mark and attesting witness does not require a rejoinder.—COLLINS V. PARTIN, Ky., 42 S. W. Rep. 1111.

9. CARRIERS OF LIVE STOCK—Negligence.—In the absence of a special contract by the carrier to deliver stock at a point beyond its line, it is not liable for injury to the stock after its delivery to a connecting line.—LOUISVILLE & N. R. CO. V. COOPER, Ky., 42 S. W. Rep. 1134.

10. CARRIERS OF PASSENGERS—Ejection from Moving Train—Injuries.—A mere requirement or command by a conductor to a passenger to get off a moving train, when the danger of doing so is evident, if unattended with force, threats, or overpowering intimidation, is not enough to make the railroad company liable for injuries resulting from the passenger's compliance.—BOSWORTH V. WALKER, U. S. C. C. of App., Seventh Circuit, 83 Fed. Rep. 58.

11. Certiorari—Remedy.—When sought as between private persons, the general rule is that the writ of *certiorari* will be granted or denied, in the sound discretion of the court, on special cause or ground shown, and will be refused where there is a plain and equally adequate remedy by appeal or otherwise.—IN RE TAMPA SUBURBAN R. CO., U. S. S. C., 18 S. C. Rep. 177.

12. CHATTEL MORTGAGE—Consideration.—A promise to execute a chattel mortgage, or a defectively executed or unrecorded mortgage, creates an equitable lien on the property, which will be enforced by a court of equity against the mortgagor.—TEXTOR V. ORR, Md., 38 Atl. Rep. 939.

13. CHATTEL MORTGAGES—Effect of Payment.—An instrument which purports to convey absolute title to personal property to secure a described promissory note, but which recites that the property is to be held in trust for the payment of that note, is executed and discharged by the fact of such payment, and the legal title in the grantee is then defeated. The creation of the trust for the purpose stated is the same, in effect, as the insertion of a defeasance clause in the instrument; and, this being true, such instrument is a mortgage, and not a bill of sale which passed indefeasible title.—WARD V. LORD, Ga., 28 S. E. Rep. 446.

14. CHATTEL MORTGAGE TO WIFE—Validity.—A chattel mortgage made by a husband directly to his wife, without the intervention of trustees, is good in equity.—GARWOOD V. GARWOOD, N. J., 38 Atl. Rep. 954.

15. CONSTITUTIONAL LAW — Lottery Franchises.—A lottery franchise granted by a State is not in any sense a contract, within the meaning of the constitutional provision forbidding the States to pass laws impairing the obligation of contracts, but is simply a gratuity and license; and the State, under its police powers, and for the protection of the public morals, may at any time revoke such license, and forbid the further conduct of the lottery. And no right acquired during the life of the grant, on the faith of, or by agreement with, the grantee, can be exercised after the revocation of such grant and the forbidding of the lottery, if its exercise involves a continuance of the lottery as originally authorized.—DOUGLAS V. COMMONWEALTH OF KENTUCKY, U. S. S. C., 18 S. C. Rep. 199.

16. CONSTITUTIONAL LAW—Special Legislation.—Under the Kansas constitution (art. 2, § 17), prohibiting special legislation unless necessary, it is for the legislature, and not the courts, to determine whether a special law is necessary.—RATHBONE V. BOARD OF COM'RS OF KIOWA COUNTY, KAN., U. S. C. C. of App., Eighth Circuit, 83 Fed. Rep. 125.

17. CONTRACTS—Pleading.—A petition alleging that plaintiff was engaged, in 1882, in promoting a proposed railroad enterprise, and the defendant agreed with him to aid in furnishing means for constructing it; that in 1884 work ceased because another company had acquired and used a part of the proposed right of way; and that thereafter no work was done, and defendant ceased to contribute further. Plaintiff demanded an amount representing investments, loss of prospective profits, and his salary from the company. On demurrer, held, that the petition failed to set forth a cause of action.—PORTER V. BLAIR, U. S. C. C., N. D. (Iowa), 83 Fed. Rep. 105.

18. CORPORATIONS—Insolvency — Mortgage.—A corporation, after becoming insolvent, cannot give a mortgage to secure a pre-existing debt, though the creditor have no notice of the insolvency; Corporation Act (P. L. 1896, p. 298), § 64, prohibiting a transfer by corporations, after becoming insolvent, of any of their estate or effects, except to *bona fide* purchasers for valuable consideration.—FROST V. BARNERT, N. J., 38 Atl. Rep. 956.

19. CORPORATIONS—Insolvency—Preferences.—A corporation in a failing condition cannot place part of its assets in the hands of a trustee to protect any of its directors as sureties on its bond.—GRAY V. TAYLOR, N. J., 38 Atl. Rep. 951.

20. CORPORATIONS—Mortgage.—The directors of a corporation which owned a sawmill and store and a por-

tion of the town site at the place where they were situated, which was at a distance from the office of the company and the residence of all its officers and directors, appointed a general manager, "with full power to manage and conduct the business of the corporation." Such manager conducted the business for some two years, buying logs, and manufacturing them into lumber, which he sold, hiring and discharging men, selling town lots, and receiving and disbursing the proceeds of the business: Held, that such manager had authority to execute a mortgage in behalf of the corporation on the town lots and logs and lumber at the mill, all of which property was held for commercial purposes, to secure the payment of indebtedness contracted in the management of the business.—THAYER V. NEHALEM MILL CO., Oreg., 51 Pac. Rep. 202.

21. CORPORATIONS—Resignation of Director.—When an officer in a private corporation tenders his resignation, whether demanded or not, and such resignation is coupled with a notice that he will claim salary for a given time thereafter, alleging that under resolutions of the stockholders he was entitled to continue in the exercise of such office to a given date, such resignation takes effect on its acceptance by the company, and such officer is not entitled to have his salary for the given time, unless it appears that the conditions named bind the company for the payment of such salary.—SAVANNAH COTTON MILLS V. CUNNINGHAM, Ga., 28 S. E. Rep. 435.

22. CORPORATIONS—Stockholder.—A shareholder cannot maintain a suit to compel the surrender to the corporation of stock illegally transferred, the repayment of dividends paid thereon, and to prevent the further payment of dividends, unless he has first applied to the corporation itself to remedy the wrong.—HUTTON V. JOSEPH BANCROFT & SONS CO., U. S. C. C., D. (Del.), 83 Fed. Rep. 17.

23. CORPORATIONS—Transfers of Stock.—Where it is the duty of a corporation to protect its stockholders from unauthorized transfers of stock, it must require satisfactory evidence of authority to transfer; and when it has notice of want of authority, or is put upon inquiry, and fails to investigate, it becomes liable, by allowing an unauthorized transfer to be made.—HUGHES V. DROVERS' & MECHANICS' NAT. BANK OF BALTIMORE, Md., 38 Atl. Rep. 936.

24. CREDITORS' SUITS — Preliminary Relief — Injunction.—Where a receiver appointed in supplemental proceedings files a bill against the judgment debtor and another person, alleging that defendants are carrying on a business which belongs to the judgment debtor, but is in the name of the other defendant to cover up the debtor's property, and the allegations of the bill are denied by defendants' answers, preliminary relief will not be granted to complainant by way of injunction or receivership.—GUILD V. MEYER, N. J., 38 Atl. Rep. 959.

25. CRIMINAL EVIDENCE—Confessions.—Facts discovered as the result of a confession may be received as evidence, though the confession is inadmissible.—TAYLOR V. COMMONWEALTH, Ky., 42 S. W. Rep. 1125.

26. CRIMINAL EVIDENCE — Homicide—Dying Declarations.—A witness testified that deceased passed his house going toward his home, a short distance away; that a few moments later he heard shots apparently in deceased's house, where defendant was shown to be at the time; that within two or three minutes deceased came to witness' house, saying he was shot, and could live but a few minutes; that witness helped him into the house; and that he became unconscious, dying in an hour and a half: Held, in view of this and other testimony tending to show suspicions relations between defendant and the wife of deceased, the declarations of deceased as to who shot him, and the reason therefor, were admissible as dying declarations.—WAGONER V. TERRITORY, Ariz., 51 Pac. Rep. 145.

27. CRIMINAL EVIDENCE — Homicide—Dying Declarations.—A declaration, made by one *in extremis*, who is conscious of his condition, to the effect that a person afterwards indicted for his homicide had "shot him down like a dog," is a statement of a fact, and not the mere expression of an opinion, by the person making the declaration, and is admissible in evidence as a dying declaration.—WHITE V. STATE, Ga., 28 S. E. Rep. 423.

28. CRIMINAL LAW — ARSON.—An indictment charging defendant with burning a dwelling house used by him "as lessee," falls within Code, § 1761, declaring that a tenant who shall injure any tenement house, etc., of his landlord by burning, shall be guilty of a misdemeanor.—STATE V. GRAHAM, N. Car., 28 S. E. Rep. 409.

29. CRIMINAL LAW—Fixing Date of Execution.—Where a judgment of death has not been executed when directed to be, and defendant has been called into court to show cause why another date for execution should not be fixed, it is not error for the court to refuse to inquire into the validity of the judgment by which defendant was convicted, nor a violation of the Penal Code, as amended in 1891 (section 1227), providing for the fixing of a date for the execution of a judgment of death after the date originally fixed has expired.—PEOPLE V. DURRANT, Cal., 51 Pac. Rep. 185.

30. CRIMINAL LAW — Former Jeopardy.—The plea of former jeopardy is not available where there has been no verdict rendered by the jury in the former trial.—ANDERSON V. STATE, Md., 38 Atl. Rep. 937.

31. CRIMINAL LAW — Former Jeopardy.—The dismissal, after hearing testimony, of an indictment for false swearing, alleged to have been committed by giving false evidence before a justice of the peace, is not a bar to a prosecution for the same offense alleged to have been committed by giving the same false evidence before a county judge, as a conviction could not have been had under the first indictment upon evidence of false swearing before the county judge.—TURNER V. COMMONWEALTH, Ky., 42 S. W. Rep. 1129.

32. CRIMINAL LAW—Homicide—Self-defense.—The defendant cannot complain of an instruction authorizing the jury to acquit on the ground of self-defense if they believed that he killed P under the belief that P was R, when he believed, and had reasonable grounds to believe, that he was in danger at the hands of R, unless they should further believe from the evidence beyond a reasonable doubt that he was then seeking R, "for the purpose of inflicting death or great bodily harm upon him."—SMITH V. COMMONWEALTH, Ky., 42 S. W. Rep. 1138.

33. CRIMINAL LAW — Homicide — Self-defense.—One who voluntarily enters into a combat with another may nevertheless avail himself of the plea of self-defense, if he had not a felonious design in bringing on the trouble, and abandoned the conflict in good faith, and was pursued by his antagonist, so that he had to take his life to save his own.—STATE V. VAUGHAN, Mo., 42 S. W. Rep. 1080.

34. CRIMINAL LAW — Impeachment of Witness.—It is not competent for the commonwealth to impeach a witness for defendant by showing that she is under indictment as an accessory to the offense with which defendant is charged.—LEWIS V. COMMONWEALTH, Ky., 42 S. W. Rep. 1127.

35. CRIMINAL LAW — Indictment—Time of Finding.—An indictment which alleges that defendant kept a nuisance on a certain day, and on divers other days between that day and the date of finding the indictment, need not specifically allege the date of finding the indictment, as it will be presumed to have been found on the day the grand jury was impaneled and sworn.—STATE V. BOWES, R. I., 38 Atl. Rep. 948.

36. CRIMINAL LAW — Marriage.—As a marriage celebrated before an unauthorized person is a nullity, and cannot be legalized by consent, a conspiracy to procure sexual intercourse with a woman through such a marriage is an indictable offense.—STATE V. WILSON, N. Car., 28 S. E. Rep. 416.

37. CRIMINAL LAW — Seduction—Corroboration.—It is enough, under Rev. St. 1889, § 4212, declaring that "in

trials for seduction under promise of marriage, the evidence of the woman as to such promise must be corroborated to the same extent required of the principal witness in perjury," that prosecutrix's mother testified to repeated visits of defendant to prosecutrix, that they were very affectionate when together, and that on one occasion, in her hearing, defendant proposed marriage to prosecutrix.—STATE v. DAVIS, Mo., 42 S. W. Rep. 1083.

38. CRIMINAL PRACTICE—Forgery — Indictment.—An indictment charging defendant with having "unlawfully and feloniously" caused a certain instrument to be forged, "with intent to defraud," etc., is good, without expressly averring that it was done "with a felonious intent."—STATE v. TOBIE, Mo., 42 S. W. Rep. 1076.

39. DEED—Cancellation—Undue Influence.—A deed will be set aside on the grounds of fraud and undue influence where no money was paid, and the grantor was an old man, blind, partially deaf, afflicted with disease, and almost helpless, and had been taken care of and nursed by the grantee and her husband for 10 years prior to his death, for which they had been paid, and they had a great influence over him, and grantee's husband did all his business, though he believed his children had driven him from home and neglected him.—DINGMAN v. ROMINE, Mo., 42 S. W. Rep. 1087.

40. DEEDS—Cancellation—Undue Influence.—When a deed is attacked on the ground of fraud in the grantee, by taking advantage of confidential relations between the grantor and himself, where the confidential relations are admitted, the burden is on the grantee to show that the grantor was not influenced thereby; and an answer stating that defendant does not know whether or not "she yielded to the persuasions or solicitations or directions, so fraudulently, as alleged, made by him, on account of or by reason of her said alleged confidence in him," etc., is to be construed as an admission that the conveyance was made as a result of the confidential relations, persuasions, etc.—GERMAN SAVINGS & LOAN SOC. v. DE LASHMUTT, U. S. C. C., D. (Oreg.), 83 Fed. Rep. 33.

41. DIVORCE — Revival of Action.—Where the husband, in an action by him for a divorce, had, after the wife had filed a counterclaim, filed an amended petition seeking to have the marriage declared void *ab initio*, his administrators had the right, after his death, to revive the cause of action set up in the amendment, it being alleged by them in an amended petition offered for that purpose that the defendant was asserting certain rights in plaintiff's estate as his widow, and that she refused to restore property of plaintiff turned over to her on a motion for alimony *pendente lite*.—BARTH'S ADMR. v. BARTH, Ky., 42 S. W. Rep. 1116.

42. EJECTMENT — Title to Maintain.—Where an ancestor, at the time of his death, has only an equity of redemption in the land in controversy, one claiming as his heir can have no legal estate in the land.—RUSSELL v. ROBERTS, N. Car., 28 S. E. Rep. 406.

43. EQUITABLE ASSIGNMENT — Order.—An order of S, on C, to pay G $1,000, "for materials furnished your [C's] building," is not an equitable assignment of any part of the fund which thereafter became due S as contractor on said building.—SEYFRIED v. STOLL, N. J., 38 Atl. Rep. 955.

44. EQUITY — Improvements on Real Estate.—Where the rightful owner of real property seeks relief from one who is *bona fide* in possession under color of title, and who has made valuable, lasting, and beneficial improvements, which enhance the value of the estate, such owner must do equity, by compensating the occupant to the extent of the benefits which accrue to the owner by reason of such improvements; but he is not liable for work performed, or for something done, which does not benefit the property, or enhance its value.—BACON v. THORNTON, Utah, 51 Pac. Rep. 153.

45. EQUITY—Subscription for Manufactory—Forfeiture.—Where certain inhabitants of a city, to induce a company to there establish and maintain a foundry, purchase and deed to the company a building site, as to which it makes an agreement with a trustee for said citizens that it will maintain and operate a foundry thereon for five years, with capacity for 100 laborers, and that it will employ that number of laborers, and conduct the business in a proper manner, failing in which it will deed the property to the trustee for the benefit of said citizens, equity will not declare a forfeiture of the property, or require specific performance of the agreement to convey (in effect a forfeiture), the company having erected the foundry on the site, and faithfully performed the contract in every particular except as to the number of laborers employed.—SEASE v. CLEVELAND, ETC. CO., Mo., 42 S. W. Rep. 1084.

46. EVIDENCE,— Parol Evidence to Vary Writing.—Whenever a written contract purports on its face to be a memorial of the transaction to which it relates, it supersedes all prior negotiations and agreements, and oral testimony will not be admitted of prior or contemporaneous promises on a subject so clearly connected with the principal transaction as to be a part and parcel of it, without the adjustment of which the parties cannot be considered as having finished their negotiations and finally concluded a contract.—GODKIN v. MONAHAN, U. S. C. C. of App., Seventh Circuit, 83 Fed. Rep. 116.

47. EXECUTIONS — Judgment for Tort.—Under a judgment in favor of tenants in common against their cotenants, who were husband and wife, for the use and occupation of certain land of which they had been deprived by a wrongful ouster, a levy on the separate property of the wife was proper, though such judgment contained no specific direction for execution against such separate estate, as such judgment was for a tort, and might therefore follow the usual form of judgments against joint tort-feasors.—TAYLOR v. STEPHENS, Tex., 42 S. W. Rep. 1049.

48. EXECUTION — Sheriffs and Constables — Wrongful Levy.—A sheriff is not liable as a trespasser for seizing the personal property of another in possession of the execution defendant, unless he had notice of the true ownership of the property at the date of the levy, or refused to deliver possession to the owner after he received information as to the ownership upon proper demand made.—ARMSTRONG v. BELL, Ky., 42 S. W. Rep. 1131.

49. FALSE IMPRISONMENT—Acts of Judicial Officers.—Under Ky. St. § 1930, a police judge who orders the commitment to jail of one charged with a felony, for whose arrest no warrant has been issued, and without hearing any evidence of his guilt, acts without jurisdiction, and is therefore liable in an action for false imprisonment, though his motives may not have been improper or corrupt.—GLAZAR v. HUBBARD, Ky., 42 S. W. Rep. 1114.

50. FEDERAL COURTS — Concurrent Appeals.—Where an appeal is taken to the supreme court direct, on the ground that the case involves the construction or application of the constitution of the United States, and an appeal is also taken to the circuit court of appeals, the latter court will stay its hand until the appeal in the supreme court is disposed of, and will not in the meantime certify to the supreme court the question whether it has jurisdiction to hear and determine the cause.—PULLMAN'S PALACE-CAR CO. v. CENTRAL TRANSP. CO., U. S. C. C. of App., Third Circuit, 83 Fed. Rep. 1.

51. FEDERAL AND STATE COURTS—Rules of Property—Insolvent Bank.—It has been established by the Supreme Court of Iowa that, in order to fasten a special trust upon funds held by the receiver of an insolvent bank in that State, it is not necessary to trace the deposit into any specific property in his hands, but that it is sufficient to show that the estate in his hands has been augmented by the trust fund in question: Held, that this constitutes such a rule of property as to be

binding on the federal courts.—INDEPENDENT DISTRICT OF PELLA V. BEARD, U. S. C. C., S. D. (Iowa), 83 Fed. Rep. 5.

52. FRAUDS, STATUTE OF—Land Contracts—Parol Evidence.—A document upon which a suit for specific performance of a contract to partition land was brought was as follows: "Proposition: All costs and lawyer's fees for litigation, $150; also $1,000 for choice of corner." "I accept the above proposition. T. H. Zanderson:" Held, that such instrument, without the assistance of oral testimony, is unintelligible and void, as not complying with the statute of frauds. — SULLIVAN V. ZANDERSON, TEX., 42 S. W. Rep. 1027.

53. FRAUDS, STATUTE OF — Presumption.—A contract of employment for a year will not be presumed to be within the statute of frauds, it not appearing that performance was not to begin at once. — A. B. SMITH CO. V. JONES, Miss., 22 South. Rep. 802.

54. FRAUDULENT CONVEYANCE.—A deed which, when drawn, was intended by the grantor to operate to put his property out of the reach of his creditors, will not be set aside as fraudulent if it appears that, at the time of its delivery and acceptance by the grantee, the sole object of both the parties to the instrument was that it should be held by the grantee as a security for the payment of a debt due from the grantor to a third person. —STEWART V. EXCHANGE BANK OF MANNINGTON, N. J., 38 Atl. Rep. 952.

55. FRAUDULENT CONVEYANCES — Evidence. — Under Sand. & H. Dig. § 3472, making void all conveyances with intent to hinder or delay creditors, it is error to instruct that such a conveyance is void as to subsequent creditors only if the debtor at the time intended to contract the debts and not pay them. — SEMMES V. UNDERWOOD, Ark., 42 S. W. Rep. 1069.

56. HUSBAND AND WIFE—Transfer to Wife in Fraud of Creditors. — An agreement by the husband to reinvest for the wife's benefit her money reduced by him to possession, but fixing no time or place or particular property for the reinvestment, does not constitute a consideration for a transfer of property by the husband to the wife, made 28 years thereafter, and such transfer is therefore void as to the husband's existing debts. — DARLING V. HANKS, Ky., 42 S. W. Rep. 1130.

57. INJUNCTION — Interest of Complaints. — Bondholders seeking relief, by injunction, against the enforcement of an ordinance fixing rates of fare on a street railroad, have sufficient interest in the matter to give them a standing in court, if they show a well-grounded apprehension of loss by the enforcement of the ordinance. — OLD COLONY TRUST CO. V. CITY OF ATLANTA, U. S. C. C., N. D. (Ga.), 83 Fed. Rep. 39.

58. INSOLVENCY — Purchase of Goods by Insolvent.—On the question whether one who buys goods on credit, upon his written representation of perfect solvency, and fails three weeks later, was insolvent at date of purchase, and knew it, it is not competent for him to show that he had made some profits during the two years previous. — WAPLES PLATTER CO. V. TURNER, U. S. C. C. of App., Eighth Circuit, 83 Fed. Rep. 64.

59. INSURANCE—Avoidance of Policy.—A condition in a policy that the mill insured shall be run not later than 10 o'clock at night, and that a violation of this stipulation should create a forfeiture of the policy, is a substantial condition, especially where the premium required for a mill running day and night is greater than for a mill which runs in the daytime only. — ALSPAUGH V. BRITISH AMERICA INS. CO. OF TORONTO, CANADA, N. Car., 28 S. E. Rep. 415.

60. INSURANCE—Mistake in Policy.—A wife cannot recover on a policy on her property issued in her husband's name, on the theory that the mistake was that of the agent, where the only evidence of the agent's knowledge of the true ownership was the fact that in a conversation about other matters between several persons, including the agent, the ownership of this property was mentioned. — CONNECTICUT FIRE INS. CO. V. SMITH, Colo., 51 Pac. Rep. 170.

61. INTEREST — Unliquidated Damages. — Interest is allowable on unliquidated damages where the demand is based on the value of shares of stock, and the evidence respecting it, as to the price at which other shares of the same stock were sold, is uncontradicted. —KUHN V. MCKAY, Wyo., 51 Pac. Rep. 205.

62. INTOXICATING LIQUORS — Illegal Sale. — Where a person residing and having a building used for the storage of whisky near a railway station, within two miles of a certain church, the sale of intoxicating liquors being prohibited by statute within two miles of said church, receives an order from a resident of South Carolina for a certain quantity of whisky at an agreed price, and, in pursuance of said order, shipped from his said warehouse, by the railroad, from its station, the quantity of whisky ordered, to the resident of South Carolina at his home, it is a sale of the whisky within the prohibited territory; and the person so shipping is guilty under the statute, notwithstanding the interstate commerce law. — STATE V. GROVES, N. Car., 28 S. E. Rep. 408.

63. INTOXICATING LIQUORS — License — Lien.—Under Pol. Code, § 4049, providing that all property used in any trade for which a license is required shall be subject to a lien for the amount thereof, which lien shall have precedence over any other lien, property in possession of a retail liquor dealer is subject to the prior lien of a license tax, though there was a duly-recorded chattel mortgage thereon. — BURFIEND V. HAMILTON, Mont., 51 Pac. Rep. 161.

64. INTOXICATING LIQUORS — Place of Sale. — Where whisky ordered by letter is shipped from one county to another by express, C. O. D., the sale takes place in the county in which the whisky is delivered to the carrier, and is not a violation of a prohibitory liquor law in force in the county to which it is shipped. — JAMES V. COMMONWEALTH, Ky., 42 S. W. Rep. 1107.

65. JUDGMENT—Lien on Personalty.—Where plaintiff had obtained a judgment against one D, and defendant had, subsequently to the rendition and enrollment of said judgment, acquired and disposed of certain personal property belonging to D for his own use, and upon which the judgment was a general lien, but which had never been taken in execution under said judgment, plaintiff has no claim against defendant for the proceeds of said personal property. — SIMPSON V. SMITH SONS GIN & MACHINE CO., Miss., 22 South. Rep. 805.

66. JUDGMENTS — Relief — Appearance by Unauthorized Attorney. — Courts will relieve a party from a judgment rendered against him in consequence of the acts of an unauthorized attorney, without regard to the ability of the attorney to respond to his assumed client for damages, or whether he acted in collusion with the other party. — STANTON-THOMPSON CO. V. CRANE, Nev., 51 Pac. Rep. 116.

67. LANDLORD AND TENANT — Covenant to Repair — Measure of Damages. — A lease contained a covenant by the lessee that upon the termination thereof he would deliver up certain parts of the property "in as good repair as the same now are, or to pay to" the lessor "a sum sufficient to put said parts in such repair." In an action for damages for a breach, held, that the landlord was entitled to a sum sufficient to make the repairs stipulated for, and that, if this could only be done by the use of new materials, no deduction should be allowed the tenant on that account, and that in such case the landlord would not be restricted to the difference between the value of the property when received by the tenant and its value when surrendered. —BURKE V. PIERCE, U. S. C. C. of App., Third Circuit, 83 Fed. Rep. 95.

68. LANDLORD AND TENANT—Estoppel.—After the tenant has been evicted by his landlord, he may become tenant to some other person who has come into possession, and hold the property adversely to his former landlord, without thereby subjecting himself to the penalty of double rent.—EVANS' ADMR. V. LITTLE, Ky., 42 S. W. Rep. 1110.

69. LANDLORD AND TENANT—Leases.—Though an unrecorded lease was invalid as to third persons, yet, where the circumstances connected with it were such that the law implied a tenancy, the lease is admissible in evidence to show the terms of such tenancy.—EMRICH v. UNION STOCK YARD CO. OF BALTIMORE COUNTY, Md., 38 Atl. Rep. 943.

70. LIFE INSURANCE—Conflict of Laws—What Law Governs.—Where an application to a New York life insurance company for a policy is made in another State, where also the advance premium is paid to the company's agent to be forwarded to the company, under an agreement that the insurance is not to take effect unless the premium is accepted and the risk approved in New York, and, by the terms of the policy issued, all premiums and the policy itself are payable in New York, and proof of death is to be there made, the policy is a New York contract, and the rights of the parties thereunder are governed by the statutes of New York, there being no statute in the other State affecting the rights of the parties.—EQUITABLE LIFE ASSUR. SOC. OF UNITED STATES v. TRIMBLE, U. S. C. C. of App., Ninth Circuit, 83 Fed. Rep. 85.

71. LIFE INSURANCE—Paid-Up Policy.—Under a policy of insurance providing that, "after three full annual payments have been paid upon this policy, the company will upon the legal surrender thereof before default in payment of any premiums, or within six months thereafter, issue a non-participating policy for paid up insurance, payable as herein provided, for the proportion of the amount of this policy which number of full years' premium paid bears to the total number required," time is not of the essence of the contract, and the insured does not lose his right to a paid-up policy by failure to demand it, or to surrender the original policy, within six months after default.—MUTUAL LIFE INS. CO. OF NEW YORK v. JARBOE, Ky., 42 S. W. Rep. 1097.

72. LIMITATION OF ACTIONS—Amendment to Petition—New Cause of Action.—Where an action is begun before expiration of the period of limitation, an amendment of the petition, after the expiration of such period, whereby the plaintiff, instead of suing for his own benefit, alleges that he sues by the authority and for the use and benefit of a third party, does not change the cause of action so as to subject the suit to the bar of the statute.—MIDDLESEX BANKING CO. v. SMITH, U. S. C. C. of App., Fifth Circuit, 83 Fed. Rep. 133.

73. LIMITATION OF ACTIONS—Married Women.—Under statutes providing that all forms of debt are barred by limitations in 10 years or less, and Sand. & H. Dig. § 5094, providing that an action on a trust deed is barred with the debt thereby secured, a conveyance in 1875 by the beneficiary in a trust deed given in 1841 to secure a debt due in 1842 gives no title.—ROWLAND v. MCGUIRE, Ark., 42 S. W. Rep. 1068.

74. MANDAMUS TO CLERK OF COURT—Appeal.—*Mandamus* will not issue to compel the clerk of the district court to deliver a transcript, on appeal by plaintiff, under Rev. St. 1895, art. 1387, authorizing an appeal by affidavit of inability to pay or secure the costs, where the judgment appealed from is described as one for costs only.—DEMONET v. JONES, Tex., 42 S. W. Rep. 1033.

75. MANDAMUS TO STATE TREASURER.—The State treasurer will not be compelled by *mandamus* to register and pay orders drawn on the permanent school fund by the State school fund commissioners to pay for bonds purchased by them, where it appears that the price agreed to be paid is more than the actual market price thereof at the time of the purchase, even though the excess above the market price be so small that the purchase cannot be declared an improvident one.—FIRST NAT. BANK OF TOPEKA v. HEFFLEBOWER, Kan., 51 Pac. Rep. 225.

76. MARRIAGE—Annulment—Duress.—Where a man has been guilty of illicit intercourse with a woman, and marries her under the constraint of either civil or criminal proceedings based thereon, such constraint does not of itself constitute a valid ground for annulling the marriage; and the man's misconception of the length of the term of imprisonment to which he might be sentenced does not change this rule.—INGLE v. INGLE, N. J., 38 Atl. Rep. 953.

77. MARRIAGE—Validity—Lunatics.—A marriage with a declared lunatic is *ab initio* void.—SIMS v. SIMS, N. Car., 28 S. E. Rep. 407.

78. MARRIED WOMAN—Statutes—Retroactive Laws.—Act 1875 (Rev. St. 1889, § 6869), providing that property acquired by the wife shall remain her separate property, and under her sole control, does not affect rights acquired under marriages then in existence.—LEETE v. STATE BANK OF ST. LOUIS, Mo., 42 S. W. Rep. 1074.

79. MASTER AND SERVANT — Negligence — Notice.—Knowledge acquired by a conductor, while in charge of a train, touching the recklessness and misconduct of his engineer, is notice to the railroad company, so as to render it liable to a brakeman for an injury thereafter received through the engineer's recklessness and incompetency, though the conductor is not empowered to discharge the engineer.—EAST TENNESSEE, V. & G. R. CO. v. WRIGHT, Tenn., 42 S. W. Rep. 1065.

80. MINES AND MINERALS—Patents—Extent of Grant.—Where the area of a quartz claim as located was, except as to 2.98 acres thereof, embraced in a conflicting location, which was expressly excepted from the grant in the patent thereto, such patent was void in so far as it attempted to convey the lode on its strike independently of the granted surface of 2.98 acres, as the mining statutes contain no authority for the conveyance of the lodes or veins embraced in such claim independently of the surface ground connected with and containing or overlying them.—MONTANA ORE PURCHASING CO. v. BOSTON & M. CONSOL. COPPER & SILVER MIN. CO., Mont., 51 Pac. Rep. 159.

81. MINES AND MINING—Eminent Domain—Condemnation of Tunnel.—Under the Nevada statute of March 1, 1875 (Gen. St. §§ 256 273), authorizing the condemnation of rights of way for mining tunnels, a mining company may condemn, for use in reaching its mine, an old and partially ruined tunnel in a neighboring claim, which is not used by the owners of that claim at the time, there being nothing to show any present purpose to use it.—BYRNES v. DOUGLASS, U. S. C. C. of App., Ninth Circuit, 83 Fed. Rep. 45.

82. MORTGAGES—Notice—Unrecorded Deed.—It is incumbent upon one who purchases or contracts for a lien on land to inquire into the right of any person in possession thereof, and such possession charges the former with notice of whatever title or right the occupant really has in the premises.—NEAL v. JONES, Ga., 28 S. E. Rep. 427.

83. MORTGAGES — Power of Sale — Limitations.—A power of sale in a trust deed may be enforced, though recovery on the note secured by the deed is barred by limitations.—DIMMIT COUNTY v. OPPENHEIMER, Tex., 42 S. W. Rep. 1029.

84. MORTGAGES—Right of Mortgagee to Redeem.—As a mortgage does not, in this State, pass title to the mortgagee, the latter is not an "owner" of the mortgaged property, and therefore is not entitled, under section 909 of the Civil Code, to redeem land upon which he held a mortgage, where the same was sold under a tax execution against the mortgagor.—MIXON v. STANLEY, Ga., 28 S. E. Rep. 440.

85. MUNICIPAL CORPORATIONS — License.—A power conferred upon a municipal corporation by its charter, which authorizes it "to levy and collect such special tax on trades, businesses, occupations, theatrical exhibitions, or other performances exercised, performed or carried on within the corporate limits of said town, including circuses and shows of all kinds, itinerant traders, peddlers, auctioneers and other games or trades or occupations subject to special tax under the State law, as they may deem proper," is well exercised by the exaction of a license fee for engaging in any

occupation or business which may fall within the special descriptive terms of the power, and may likewise be exercised by the levy of a special license fee upon such other occupations, games, etc., as are made subject to a special tax by the general statute law of the State.—MARTIN V. TOWN OF STATESBORO, Ga., 28 S. E. Rep. 450.

86. MUNICIPAL CORPORATIONS—Title under Conflicting Surveys.—In an action by one in possession of land to restrain a city from appropriating it as a street, the burden is on the city to show title to said land.—OGLESBY V. CITY OF SANTA BARBARA, Cal., 51 Pac. Rep. 181.

87. MUTUAL BENEFIT INSURANCE—Beneficiary.—The laws of a mutual benefit society provided that each member might designate the person to whom his mortuary fund should be paid; that, should such person die before the member, the fund should be paid to the member's surviving widow and children; and that if there should be no one living, entitled to the fund, it should revert to the society: Held that, where a member had never designated any beneficiary, his mortuary fund reverted to the society, even though he left a widow.—GRAND LODGE, A. O. U. W. OF TEXAS V. CLEGHORN, Tex., 42 S. W. Rep. 1043.

88. NEGLIGENCE—Contributory Negligence—Proximate Cause.—One who seizes the bridle rein of her horse, in an attempt to prevent him from running away, when he has been frightened by a collision with another team (there being a helpless child in the wagon), and in so doing is injured by the horse she is attempting to hold, is not guilty of contributory negligence, as a matter of law.—WILLIS V. PROVIDENCE TELEGRAM PUB. CO., R. I., 38 Atl. Rep. 947.

89. OFFICER EXCEEDING HIS AUTHORITY—Criminal Liability.—An officer who, in the performance of what he conceives to be his official duties, transcends his authority, and invades private rights, is answerable therefor to the government under whose appointment he acts, and to individuals injured by his action; but where there is no criminal intent he is not liable to answer the criminal process of another government.—IN RE LEWIS, U. S. D. C., D. (Wash.), 83 Fed. Rep. 159.

90. PARTNERSHIP—Notice of Dissolution.—Plaintiffs having traded with J and D as partners in 1891, D is liable for the price of goods sold to J in 1893 on the joint account, after the dissolution of the partnership, if plaintiffs had no notice of the dissolution.—HUMPHREY V. MATTOX, Ky., 42 S. W. Rep. 1100.

91. PAYMENT—Burden of Proof.—In a suit on account, for merchandise, the burden is on defendant to show payment.—BLASS V. LAWHORN, Ark., 42 S. W. Rep. 1068.

92. PLEADING AND PROOF—Variance.—In an action for personal injuries, where definite acts of negligence are alleged in the declaration, plaintiff cannot recover for other negligent acts.—EAST TENNESSEE COAL CO. V. DANIEL, Tenn., 42 S. W. Rep. 1062.

93. PRINCIPAL AND AGENT—Sales by Agent.—Where a purchaser of goods from agents knows whom they are agents for, and that the goods in question are of the principal's manufacture, and where the invoice calls attention to the agency and to the principal's ownership, the purchaser is liable to the principal for the agreed price.—MOLINE MALLEABLE IRON CO. V. YORK IRON CO., U. S. C. C. of App., Seventh Circuit, 83 Fed. Rep. 66.

94. RAILROAD COMPANY—Bailment—Goods in Railroad Depot.—While a railroad company which has carried property for hire is keeping it for a reasonable time in its own warehouse, at the point of destination, until it shall be called for, it is a bailee for hire, and not a naked depository.—HARDMAN V. MONTANA UNION RY. CO., U. S. C. C. of App., Ninth Circuit, 83 Fed. Rep. 88.

95. RAILROAD COMPANY—Death at Crossing—Contributory Negligence.—The mere fact that one approaching a railroad crossing in a wagon was not seen by the witnesses of the accident to stop or turn his head to look and listen is not conclusive of contributory negligence, so as to require withdrawal of the case from the jury, where there were indications from the track of his wagon that he may have seen the train as soon as it was possible to do so from the conformation of the ground, and that he attempted to get out of its way; there being also evidence tending to show that no signal was given by the approaching train.—NORTHERN PAC. R. CO. V. FREEMAN, U. S. C. C. of App., Ninth Circuit, 83 Fed. Rep. 82.

96. RAILROAD COMPANY—Killing Stock.—Relatively to the question of liability upon the part of the railroad company for the killing of live stock by the running of a train, it is not incumbent upon the company to require the fireman employed on the locomotive to be upon the lookout for animals upon the track at times when he is necessarily engaged in the performance of other duties indispensable to the running of the locomotive, nor to have thereon a third employee, charged exclusively with the duty of keeping such a lookout.—ROGERS V. GEORGIA R. CO., Ga., 28 S. E. Rep. 457.

97. RECEIVERS.—A creditor or his representative should not be appointed receiver or be allowed to act; nor should an attorney of such creditor or defendant, or of any party whose interest may conflict with other parties, or any of them, be employed by the receivers; but, if such attorney or receiver serves without objection made to him or to the court, he may be allowed a reasonable compensation.—GEYSER MIN. CO. V. BANK OF SALT LAKE, Utah, 51 Pac. Rep. 151.

98. RECEIVERS—Compensation of Attorney.—Where all the assets of a corporation were in the hands of a receiver, and services were rendered by an attorney at law not employed by the receiver, but employed by the corporation, without leave of the court, which services availed nothing either in saving or increasing the assets, such attorney is not entitled to compensation out of the fund in the hands of the receiver.—ANDERSON V. FIDELITY & DEPOSIT CO. OF BALTIMORE, Ga., 28 S. E. Rep. 468.

99. RECEIVERS—Liabilities to Employees.—Prior to the passage of the act of 1895, fixing and defining the liability of receivers and others operating railroads, it was the law, as announced by repeated rulings of this court, that an employee could not recover from such receiver damages for personal injuries, when it appeared that the injuries were occasioned by the fault or negligence of a fellow-servant; and consequently an action for damages resulting from such injuries inflicted at a date antecedent to the passage of this act was properly dismissed on general demurrer.—BARRY V. MCGHEE, Ga., 28 S. E. Rep. 455.

100. RECEIVERS—United States Receivers—Actions Against.—Under sections 2 and 3 of the act of congress of August 13, 1888 (25 Stat. 436), amendatory of the federal judiciary act, receivers over property, appointed by the United States courts, are required to manage or operate the trust property according to the laws of the State in which it is situated, and may be sued, in respect to its management or operation, in the courts of such State, without the previous leave of the court appointing them; and in such cases a judgment rendered in the State court is conclusive upon the federal court as to the existence and amount of the plaintiff's claim, but the time and manner of its payment are to be controlled by the court under whose orders the receiver acts.—REINHART V. SUTTON, Kan., 51 Pac. Rep. 221.

101. RECEIVERS OF CORPORATIONS—Liability for Torts.—A receiver of a corporation, appointed in an action to foreclose a mortgage, is not liable for a tort committed by the corporation prior to the receivership.—NORTHERN PAC. R. CO. V. HEFLIN, U. S. C. C. of App., Ninth Circuit, 83 Fed. Rep. 93.

102. REPLEVIN BY AGENT.—An agent who takes in his own name a bill of sale of personal property in payment of a debt due to his principal, and who, upon taking possession of the property for his principal, is dispossessed of it by third parties, cannot maintain

replevin in his own name for its repossession, under a general allegation of ownership in himself, without stating the facts in relation to his special interest and right of possession.—WARD v. RYBA, Kan., 51 Pac. Rep. 223.

103. RES JUDICATA — Presumptions.—Where plaintiff was entitled to property that came to the hands of an assignee for creditors, and the assignee had sold a portion thereof, and the court permitted plaintiff to replevin the unsold portion only, he may recover the value of the portion sold in a separate action, after recovering the unsold portion.—TAUB v. MCCLELLAND-COLT COMMISSION CO., Colo., 51 Pac. Rep. 168.

104. SALE—Warranty of Title.—In an action to recover damages for alleged breach of warranty of title upon a sale of certain locomotives, held, on the evidence, consisting of certain correspondence between the parties, that the sale was not made by defendants to plaintiffs, but to a railroad company, from which plaintiffs subsequently purchased, and that defendants were therefore not liable because of a failure of title.—POST v. BURNHAM, U. S. C. C. of App., Third Circuit, 88 Fed. Rep. 79.

105. TAXATION—Tax Titles—Levy.—*Prima facie*, an indorsement upon a levy required in making an execution sale for taxes reciting that the levy was made, is sufficient to show that there was a seizure by entry.—TEXTOR v. SHIPLEY, Md., 38 Atl. Rep. 982.

106. RAILROAD COMPANY — Construction—Duties and Powers.—A railway company in this State, consolidating with a company of another State, creates a new corporation; and the time within which the new corporation is required to begin the construction of its road, and within which to make an expenditure of 10 per cent. of its capital stock (when such beginning and expenditure have not been made before), and the time within which it is required to finish and put its road in full operation (when not finished and put in full operation before), begin to run when its articles are filed with the auditor and secretary of state.—RIO GRANDE W. RY. CO. v. TELLURIDE POWER-TRANSMISSION CO., Utah, 51 Pac. Rep. 146.

107. TRESPASS TO TRY TITLE — Evidence.—Where plaintiff's evidence shows that a woman was the common source of title, and that plaintiff derives title through her will, evidence that she was married when the land was conveyed to her, that her husband and children survived her, and that neither he nor his heirs had conveyed the land, is inadmissible to disprove common source, since the husband's interest, if the land was community property, would be merely an equitable title, with which defendant was not connected.—WEST v. KEETON, Tex., 42 S. W. Rep. 1035.

108. TRIAL—Right to Open and Close.—In order to entitle the defendant in a civil action, arising *ex contractu*, to the opening and conclusion of the argument, by virtue of an admission that the plaintiff has a *prima facie* right to recover, the defendant must, before the introduction of any evidence, admit facts authorizing, without further proof, a verdict in the plaintiff's favor for the amount claimed in the declaration. It is too late, after the plaintiff has made out a *prima facie* case, for the defendant to make any admission which will deprive the plaintiff of the right to open and conclude.—ABEL v. JARRATT, Ga., 28 S. E. Rep. 453.

109. TRIAL—Verdict—Damages.—In an action for damages, a verdict "for plaintiff," without an assessment of damages, does not entitle plaintiff to judgment, and should therefore be set aside; the court having no power to assess the damages.—CHESAPEAKE, ETC. R. CO.'s RECEIVERS v. MADDOX, Ky., 42 S. W. Rep. 1124.

110. TRUST DEED — Husband and Wife.—Where the wife and daughter, upon the latter's arrival at majority, with the consent of the grantor, voluntarily divided between themselves all of the then remaining property covered by the trust deed, the daughter taking absolute possession and control of the portion falling to her, and the wife's portion (consisting mainly of a plantation) remaining in her husband's possession and under his control, his life estate therein continued; and, after his death without other issue, such plantation belonged absolutely to the wife.—BYNE v. CORKER, Ga., 28 S. E. Rep. 443.

111. VENDOR AND PURCHASER — Action for Price.—Where a suit was brought by a vendor against a vendee for the purchase money of land of which the defendant was in undisturbed possession under a deed from the plaintiff, and an essential element of a defense which the defendant attempted to set up by special pleas was want of title in the plaintiff at the time such deed was executed, and the pleas in question did not, by their allegations, affirmatively show such want of title, there was no error in striking them on demurrer.—ELLIS v. LOCKETT, Ga., 28 S. E. Rep. 462.

112. VENDOR AND PURCHASER—Contract for Exchange —Partial Performance.—A party to a contract for exchange of lands, having paid the "boot money," and received deeds from the other party, and paid incumbrances on the lands so deeded him, which should have been paid by the other party, may have a lien for the amount of the incumbrances so paid declared on the lands which he agreed to convey, but has not yet conveyed, to the other party.—RAINEY v. HINES, N. Car., 28 S. E. Rep. 410.

113. VENDOR AND PURCHASER—Quantity Conveyed.—Where a deed conveys the land by metes and bounds, and states that the tract contains a certain number of acres "more or less," the sale is in gross, and not by the acre; and it is not error to charge that, if it contains less, the burden is upon the purchaser to show that the parties had a different intention.—WATSON v. CLINE, Tex., 42 S. W. Rep. 1037.

114. VENDOR AND PURCHASER—Reformation of Deeds. —A court of equity will not grant a reformation of a deed and a mortgage for the purchase money, which by mistake of the scrivener, describe other lands than those intended to be sold, unless the vendors are able to make such a title thereto as they represented themselves to have at the time of the contract of sale.—ADAMS v. HENDERSON, U. S. S. C., 18 S. C. Rep. 170.

115. WILL—Bequest of Personalty in Trust.—A bequest of personalty to a trustee for the use and benefit of another, without words of restriction, vests the absolute property in the fund in the beneficiary.—MARTIN v. FORT, U. S. C. C. of App., Sixth Circuit, 88 Fed. Rep. 19.

116. WILL—Nuncupative Will.—A woman who was sick three months before she died, after being told by her physician three weeks before her death that she could not get well, gave her son directions before witnesses how to prepare her will. The making of the will was postponed from time to time, until she was unable to sign it: Held not good as a nuncupative will.—DONALD v. UNGER, Miss., 22 South. Rep. 803.

117. WITNESSES—Husband and Wife.—The husband and wife, by the statutes of this State, are made competent and compellable witnesses, for or against each other, in any civil action, when either is a party thereto.—FOLEY v. LOUGHRAN, N. J., 38 Atl. Rep. 960.

118. WITNESSES Impeachment.—While statements of an assignor for the benefit of creditors, made after the assignment, may be incompetent to impeach its validity, in claim and delivery by his assignee against a third person, they are admissible for the purpose of impeaching the assignor's testimony.—VOGT v. BALDWIN, Mont., 51 Pac. Rep. 157.

119. WITNESSES—Impeachment of Accused as Witness.—Under Civ. Code, § 597, providing that a witness may not be impeached "by evidence of particular wrongful acts, except that it may be shown by the examination of a witness or record of a judgment that he has been convicted of felony," it was error to permit the accused to be asked, when introduced as a witness, if he had not been arrested and tried for carrying concealed weapons, and if he had not been arrested for discharging firearms in a town.—LESLIE v. COMMONWEALTH, Ky., 42 S. W. Rep. 1095.

replevin in his own name for its repossession, under a general allegation of ownership in himself, without stating the facts in relation to his special interest and right of possession.—WARD v. RYBA, Kan., 51 Pac. Rep. 228.

103. RES JUDICATA — Presumptions.—Where plaintiff was entitled to property that came to the hands of an assignee for creditors, and the assignee had sold a portion thereof, and the court permitted plaintiff to replevin the unsold portion only, he may recover the value of the portion sold in a separate action, after recovering the unsold portion.—TAUB v. MCCLELLAND-COLT COMMISSION CO., Colo., 51 Pac. Rep. 168.

104. SALE—Warranty of Title.—In an action to recover damages for alleged breach of warranty of title upon a sale of certain locomotives, held, on the evidence, consisting of certain correspondence between the parties, that the sale was not made by defendants to plaintiffs, but to a railroad company, from which plaintiffs subsequently purchased, and that defendants were therefore not liable because of a failure of title.—POST v. BURNHAM, U. S. C. C. of App., Third Circuit, 88 Fed. Rep. 79.

105. TAXATION—Tax Titles—Levy.—*Prima facie*, an indorsement upon a levy required in making an execution sale for taxes reciting that the levy was made, is sufficient to show that there was a seizure by entry.—TEXTOR v. SHIPLEY, Md., 38 Atl. Rep. 932.

106. RAILROAD COMPANY — Construction—Duties and Powers.—A railway company in this State, consolidating with a company of another State, creates a new corporation; and the time within which the new corporation is required to begin the construction of its road, and within which to make an expenditure of 10 per cent. of its capital stock (when such beginning and expenditure have not been made before), and the time within which it is required to finish and put its road in full operation (when not finished and put in full operation before), begin to run when its articles are filed with the auditor and secretary of state.—RIO GRANDE W. RY. CO. v. TELLURIDE POWER-TRANSMISSION CO., Utah, 51 Pac. Rep. 146.

107. TRESPASS TO TRY TITLE — Evidence.—Where plaintiff's evidence shows that a woman was the common source of title, and that plaintiff derives title through her will, evidence that she was married when the land was conveyed to her, that her husband and children survived her, and that neither he nor his heirs had conveyed the land, is inadmissible to disprove common source, since the husband's interest, if the land was community property, would be merely an equitable title, with which defendant was not connected.—WEST v. KEETON, Tex., 42 S. W. Rep. 1035.

108. TRIAL—Right to Open and Close.—In order to entitle the defendant in a civil action, arising *ex contractu*, to the opening and conclusion of the argument, by virtue of an admission that the plaintiff has a *prima facie* right to recover, the defendant must, before the introduction of any evidence, admit facts authorizing, without further proof, a verdict in the plaintiff's favor for the amount claimed in the declaration. It is too late, after the plaintiff has made out a *prima facie* case, for the defendant to make any admission which will deprive the plaintiff of the right to open and conclude.—ABEL v. JARRATT, Ga., 28 S. E. Rep. 453.

109. TRIAL—Verdict—Damages.—In an action for damages, a verdict "for plaintiff," without an assessment of damages, does not entitle plaintiff to judgment, and should therefore be set aside; the court having no power to assess the damages.—CHESAPEAKE, ETC. R. CO.'S RECEIVERS v. MADDOX, Ky., 42 S. W. Rep. 1124.

110. TRUST DEED — Husband and Wife.—Where the wife and daughter, upon the latter's arrival at majority, with the consent of the grantor, voluntarily divided between themselves all of the then remaining property covered by the trust deed, the daughter taking absolute possession and control of the portion falling to her, and the wife's portion (consisting mainly of a plantation) remaining in her husband's possession and under his control, his life estate therein continued; and, after his death without other issue, such plantation belonged absolutely to the wife.—BYNE v. COHEN, Ga., 28 S. E. Rep. 443.

111. VENDOR AND PURCHASER — Action for Price.—Where a suit was brought by a vendor against a vendee for the purchase money of land of which the defendant was in undisturbed possession under a deed from the plaintiff, and an essential element of a defense which the defendant attempted to set up by special pleas was want of title in the plaintiff at the time such deed was executed, and the pleas in question did not, by their allegations, affirmatively show such want of title, there was no error in striking them on demurrer.—ELLIS v. LOCKETT, Ga., 28 S. E. Rep. 441.

112. VENDOR AND PURCHASER—Contract for Exchange—Partial Performance.—A party to a contract for exchange of lands, having paid the "boot money," and received deeds from the other party, and paid incumbrances on the lands so deeded him, which should have been paid by the other party, may have a lien for the amount of the incumbrances so paid declared on the lands which he agreed to convey, but has not yet conveyed, to the other party.—RAINEY v. HINES, N. Car., 28 S. E. Rep. 410.

113. VENDOR AND PURCHASER—Quantity Conveyed.—Where a deed conveys the land by metes and bounds, and states that the tract contains a certain number of acres "more or less," the sale is in gross, and not by the acre; and it is not error to charge that, if it contains less, the burden is upon the purchaser to show that the parties had a different intention.—WATSON v. CLINE, Tex., 42 S. W. Rep. 1037.

114. VENDOR AND PURCHASER—Reformation of Deeds.—A court of equity will not grant a reformation of a deed and a mortgage for the purchase money, which by mistake of the scrivener, describe other lands than those intended to be sold, unless the vendors are able to make such a title thereto as they represented themselves to have at the time of the contract of sale.—ADAMS v. HENDERSON, U. S. S. C., 18 S. C. Rep. 179.

115. WILL—Bequest of Personalty in Trust.—A bequest of personalty to a trustee for the use and benefit of another, without words of restriction, vests the absolute property in the fund in the beneficiary.—MARTIN v. FORT, U. S. C. C. of App., Sixth Circuit, 88 Fed. Rep. 19.

116. WILL—Nuncupative Will.—A woman who was sick three months before she died, after being told by her physician three weeks before her death that she could not get well, gave her son directions before witnesses how to prepare her will. The making of the will was postponed from time to time, until she was unable to sign it: Held not good as a nuncupative will.—DONALD v. UNGER, Miss., 22 South. Rep. 803.

117. WITNESSES—Husband and Wife.—The husband and wife, by the statutes of this State, are made competent and compellable witnesses, for or against each other, in any civil action, when either is a party thereto.—FOLEY v. LOUGHRAN, N. J., 38 Atl. Rep. 960.

118. WITNESSES Impeachment.—While statements of an assignor for the benefit of creditors, made after the assignment, may be incompetent to impeach its validity, in claim and delivery by his assignee against a third person, they are admissible for the purpose of impeaching the assignor's testimony.—VOGT v. BALDWIN, Mont., 51 Pac. Rep. 157.

119. WITNESSES—Impeachment of Accused as Witness.—Under Civ. Code, § 597, providing that a witness may not be impeached "by evidence of particular wrongful acts, except that it may be shown by the examination of a witness or record of a judgment that he has been convicted of felony," it was error to permit the accused to be asked, when introduced as a witness, if he had not been arrested and tried for carrying concealed weapons, and if he had not been arrested for discharging firearms in a town.—LESLIE v. COMMONWEALTH, Ky., 42 S. W. Rep. 1095.